IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 206

VIVEN HARRIS,

Petitioner,

—v.—

NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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Docket Entries

At a Term of the County Court held in and for the County of Westchester in the Court House, in the City of White Plains, N. Y. on the 25th, day of January, 1966.

Court met pursuant to recess

PRESENT: HON. ROBERT J. TRAINOR, COUNTY JUDGE, PART I

Special Deputy County Clerk F. J. McNulty

Stenographer J. W. Roberts

Proclamation made and Court opened

The Acting Foreman of the January Grand Jury came into Court and handed up the following 29 indictments, 1 Information as his partial report and then continued on to do his work.

* * * *

Indictments

* * * *

Viven Harris

Fel. selling narcotic drug in Viol. 3305 P.H.L., viol. 1751 subd. 1 Penal Law (2 cts) Indict. #50-66

THURSDAY, JULY 21st, 1966

At a Term of the County Court held in and for the County of Westchester in the Court House, in the City of White Plains, N.Y. on the 21st, day of July, 1966.

Court met pursuant to recess

PRESENT: HON: P. RAYMOND SIRIGNANO, COUNTY JUDGE, PART I

Special Deputy County Clerk F. J. McNulty

Stenographer P. Thompson

Proclamation made and Court opened

THE PEOPLE

vs

VIVEN HARRIS

2 cts: Feloniously selling narcotic drug in violation 3305 P.H.L. & 1751 (1) P.L. (2); Indict. #50-66

James J. Duggan A.D.A.
L. Martin

Court fixes bail in the sum of $25,000.00.

Defendant remanded.

WEDNESDAY, NOVEMBER 30th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

Stenographer Bernard Fabel

THE PEOPLE

vs

VIVEN HARRIS

2 cts: Feloniously selling narcotic drug in violation 3305 P.H.L. & 1751 (1) P.L. (2); Indict. #50-66

Thomas Facelle A.D.A.
R. Projansky

Defendant present.

Mr. Projansky challenges the array of the prospective jurors.

Mr. Facelle moves Indict. #50-66 for trial and opposes the Motion.

Hearing set for Thursday, December 1st, 1966 at 9:00 A.M.

The Panel of Jurors is excused.

Defendant remanded.

THURSDAY, DECEMBER 1st, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

Stenographer Bernard Fabel

THE PEOPLE

vs

VIVEN HARRIS

2 cts: Feloniously selling narcotic drug in viol. 3305 P.H.L. & Sec. 1751 subd. 1 Penal Law (2); Indict. #50-66

Thomas Facelle A.D.A.
E. McHugh by R. Projansky
of counsel

Hearing on challenge to the array of prospective jurors. Defendant present.

WITNESS SWORN

Ralph. T. Mumford

Defendant rests.

The challenge to the array is denied.

Defendant remanded for trial on December 5th, 1966.

MONDAY, DECEMBER 5th, 1966

At a term of the County Court held in and for the County of Westchester in the Court House, in the City of White Plains, N.Y. on the 5th day of December 1966

Court met pursuant to recess

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

Stenographer Bernard Fabel

Proclamation made and Court opened

THE PEOPLE

vs

VIVEN HARRIS

2 cts: Feloniously selling narcotic drug in violation 3305 P.H.L. & 1751 (1) P.L. (2); Indict. #50-66

T. A. Facelle A.D.A.
E. McHugh by R. Projansky of counsel

Defendant present.

Mr. Facelle moves Indictment #50-66 for trial.

The Clerk advised the defendant pursuant to Sec. 369 Code of Criminal Procedure of his right to challenge individual jurors.

The following jurors were examined, challenged or excused as shown:

Dina Ebenstein	by consent
Anthony Arancio, Jr.	by consent

Trial recessed at 4:10 P.M.

The Court admonished jurors pursuant to Sec. 415 Code of Criminal Procedure.

Defendant remanded.

TUESDAY, DECEMBER 6th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
same appearances
case continued

The selection of jurors continued.

Joseph V. Chuea	Peremptory	defendant
Clarance S. Bonney	Peremptory	defendant
Charles W. Johnson	Peremptory	defendant
Edward J. Burrell	Peremptory	defendant
Frederick G. Gylassen	Peremptory	defendant
Lucy K. Mead	Peremptory	defendant

Jurors #1-3-4-6-9-10 selected and sworn.
George White #1
Blanche K. Brill #2
Clarence W. Ostergren #4
Gerd H. Shendler #6
Onita M. Ocasio #9
Gilbert J. Stevens #10

The Court recessed at 4:50 P.M.

The Court admonished the Jurors pursuant to sec. 415 C.C.P.

Defendant remanded.

WEDNESDAY, DECEMBER 7th, 1966

HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
same appearances
case continued

Selection of jurors resumed at 11:05 A.M.
Defendant present.

Frank L. Backus	by consent
Alfred J. Lalli	by consent
Thomas H. Lane	by consent

Prospective juror #11 Thomas H. Lane is absent—another juror selected from the drum as prospective Juror #11

George P. Farrell	Peremptory	
David Harris		by consent

Court recessed for luncheon at 12:30 P.M.

Jury admonished pursuant to sec. 415 C.C.P.

Defendant remanded.

Selection of the jury resumed at 2:00 P.M.

John H. Judge	peremptory	by defendant
Katherine H. Gosselina	peremptory	by defendant
Levon K. Nahigian	peremptory	by defendant
Murray Winokor	peremptory	by defendant
Raymond O. Walsh	peremptory	by defendant
Roland B. Forsgth	peremptory	by defendant
Edmund B. Van Hook, Jr.	peremptory	by defendant
Lydia G. Gallagher	peremptory	by defendant

Juror #11 Kenneth B. Heller sworn.

WEDNESDAY, DECEMBER 7th, 1966
(Continued)

Juror #2 Edmond P. Donlon Juror #5 Roberta Juror #12 Sherman Turner sworn Juror #7 William F. Holth sworn

The Jury selected. Roll called—Jury sworn.

JURY SWORN

George R. Wyhte
Edmond P. Donlon
Blanche K. Brett
Clarence H. Ostergren
Roberta J. McCanney
Gerd H. Shindler
William F. Holth
Adolf E. Schlessinger
Anita M. Acasio
Gilbert J. Stevens
Kenneth B. Heller
Sherman Turner

The Court directed the Clerk to select and swear in two Alternate Jurors pursuant to Sec. 358-a Code of Criminal Procedure.

John D. Fors	by consent
Walter Freedman	by consent

Two alternate jurors were selected and sworn.

ALTERNATE JURORS SWORN

Evelyn P. Nazaruk
Victor J. Jenkens

Trial recessed at 4:20 P.M.

Jury admonished pursuant to Sec. 415 Code of Criminal Procedure.

Defendant remanded.

THURSDAY, DECEMBER 8th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
same appearances
case continued

Trial resumed at 9:10 P.M.

Defendant present.

Roll called—All twelve Jurors and two alternate jurors present.

Opening statements by Messr. Facelli and Projansky.

Trial recessed at 9:40 A.M. for the call of the calander.

Jury admonished pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 12:00 P.M. Defendant present.

WITNESS SWORN

Det. George Bernuder

Court recessed for luncheon at 12:35 P.M.

Jury admonished pursuant to Sec. 415 Code of Criminal Procedure.

Defendant remanded.

Trial resumed at 2:05 P.M. Defendant present.

Roll called. All 12 Jurors and two Alternate Jurors present.

WITNESS SWORN

Det. George Bernuder (resumed)

Court recessed at 4:40 P.M.

The Court admonished jurors pursuant to Sec. 415 C.C.P. Defendant remanded.

FRIDAY, DECEMBER 9th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
same appearances
case continued

Trial resumed at 11:45 A.M. Defendant present.

Roll called—All 12 jurors and 2 alternate jurors present.

In chambers in the presence of the defendant and the absence of the jury, Mr. Projansky moves to dismiss the indictment on the grounds of the grand jury minutes of the witness George Bernuder.

Defendant remanded.

Decision reserved. Motion denied.

WITNESS SWORN

Det. George Bernuder (resumed)

Court recessed at 12:25 P.M. for luncheon.

Jury admonished pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 2:25 P.M. Defendant present.

Roll called—All 12 jurors and 2 alternate jurors present.

WITNESS SWORN

Det. George Bernuder (resumed)

Court recessed at 3:30 P.M. Court admonished jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

FRIDAY, DECEMBER 9th, 1966
(Continued)

Trial resumed at 4:25 P.M., Defendant present.

All 12 jurors and 2 alternate jurors present.

WITNESSES SWORN

Det. George Bernuder
Det. Frank Scheur
Det. Richard D. Parks

People rest.

Court recessed at 6:30 P.M. for dinner.

Court admonished jurors pursuant to Sec. 415 C.C.P.

Mr. Projansky renews motion to have verdict of acquital. Motion denied. Motion to have indictment dismissed on the grounds defendant did not get a preliminary hearing. Motion denied. Mr. Projansky moves to dismiss indictment on the grounds that People have failed to prove a prima facie case. Motion denied.

Defendant remanded.

Trial resumed at 8:05 P.M. Defendant present, Mr. Facelli, A.D.A. present, Mr. Projansky, Attorney for the defendant present.

All 12 jurors and 2 alternate jurors present.

The Court adjourned until Monday, December 12th, 1966 at 10:30 A.M.

The Court admonished the jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

MONDAY, DECEMBER 12th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
Same appearances
Case continued

Trial resumed at 11:40 A.M. Defendant present.

Roll called—All 12 jurors and 2 alternate jurors present.

Defendant himself moves for a new lawyer. Motion denied.

WITNESS SWORN

Luther Harris

In Chambers, defendant present, in jurys absence, court advised the witness of his rights to remain silent to any question which might tend to incriminate him, the witness.

Defendant present. Trial recessed for luncheon at 12:25 P.M. The Court admonished the jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 2:15 P.M. Defendant present.

Roll called—All 12 Jurors and 2 Alternate Jurors present.

WITNESS SWORN

Viven Harris

Mr. Projansky moves for withdrawal of a Juror and a mistrial. Motion denied.

WITNESS SWORN

Viven Harris (re-direct)

Trial recessed at 4:00 P.M.

The Court admonished the Jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

TUESDAY, DECEMBER 13th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
Same Appearances
Case continued

Trial resumed at 9:25 A.M. Defendant present. In absence of the Jury, Mr. Projansky renews his objection to the use of certain statements made by the defendant. Motion denied.

Defendant renews his Motions to dismiss the indictment. Motion denied.

Defendant moves for a direction of acquittal. Motion denied.

The Jury returned to the Courtroom at 9:35 A.M.

Roll called—All 12 jurors and 2 Alternate Jurors present.

Summations made by Mr. Projansky.

Court recessed at 12:20 P.M. for the call of the calendar.

The Court admonished the jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 11:10 A.M. Defendant present.

Summations made by Mr. Facelle.

The Court recessed for lunch at 12:10 P.M.

The Court admonished the Jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 2:10 P.M. Defendant present.

Roll called—All 12 Jurors and 2 Alternate jurors present.

The Court charged the Jury.

TUESDAY, DECEMBER 13th, 1966
(Continued)

Officers Devine, Wall and Davis sworn pursuant to Sec. 421 C.C.P.

The Court advised the Assistant District Attorney, the Attorney for the defendant and the defendant pursuant to Sec. 425 C.C.P. in reference to the exhibits being sent to the Jury room.

The Assistant District Attorney and the Attorney for the defendant and the defendant personally, consent to the exhibits being sent to the Jury room if requested.

The Court directed that the 2 Alternate Jurors be kept separate and apart from the regular jury until a verdict is reached.

At 5:30 P.M. in the presence of the defendant, the Assistant District Attorney, and Mr. Projansky, counsel for the defendant, a note sent down by the Jurors asking, "Must a verdict for acquital also be a unanimous ballot?" was read. To which Judge Dempsey replied, "A verdict of the acquital of the defendant must be unanimous.

Defendant remanded.

At 6:05 P.M. the Jury returned to the Courtroom for further instructions. Defendant present, Assistant District Attorney present, Mr. Projansky, Attorney for the defendant present.

At 6:10 P.M. the jury retired to continue their deliberations.

Defendant remanded.

At 6:30 P.M. the Jurors recessed for dinner.

The Court admonished the Jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

Jurors returned to deliberate at 8:05 P.M.

At 9:07 the Jurors returned to the Courtroom and a roll call being taked and all Jurors being present, the Foreman stated on being asked, that their was a dis-

TUESDAY, DECEMBER 13th, 1966
(Continued)

agreement as to the 1st count of the indictment, "Feloniously selling narcotic drug in violation Sec. 3305 P.H.L. and 1751 subd. 1 P.L.

When asked the question "How do you find the defendant Viven Harris as to the 2nd ct. of the Indictment?" the Foreman announced that they find the defendant guilty as charged to Feloniously selling narcotic drug in violation of Sec. 3305 P.H.L. and Sec. 1751 Subd. 1 Penal Law.

At the request of Mr. Projansky, a roll call was taken and to the question "Is your individual verdict the same as that announced by your Foreman?" each juror responded in the affirmative.

The Jury was discharged with the thanks of the Court.

Mr. Projansky moves to set aside the verdict as being contrary to the evidence. Motion denied.

All previous Motions made during the trial are renewed by Mr. Projansky and denied by the Court.

Mr. Projansky moves for a arrest of Judgment. Motion denied.

The defendant being sworn answers all questions as follows:

Name	Viven Harris	Citizen	Yes
Born	Greensboro, No. Carolina	Birth	February 5th, 1942
Resides	34 Lincoln Ave. New Rochelle, N.Y.		
Married	Married (Erling)	Occupation	Gardner-Landscaper
Religion	Protestant	Education	10th grade
Temperate	Abstains	Parents	Mother living
Narcotic drugs	Yes—but not under the influence of drugs at the present time.		

Previous Convictions Stands Mute.

The defendant does not waive the two days notice of sentence.

Defendant remanded for sentence 1 week from today.

DECEMBER 20th, 1966

THE PEOPLE

vs

VIVEN HARRIS

2nd ct: Feloniously selling narcotic drug in violation 3305 P.H.L. and 1751 subd. 1 P.L.; Indict. #50-66

James R. Cowhey A.D.A.
E. McHugh

All Motions renewed. Mr. McHugh moves for arrest of judgment. Motion denied.

The aforesaid Viven Harris having been indicted for the crimes of Feloniously selling narcotic drug in violation 3305 P.H.L. and 1751 subd. 1 Penal Law (2), and having been convicted of the crime of Feloniously selling narcotic drug in violation 3305 P.H.L. and 1751 subd. 1 Penal Law, 2nd ct. of the indictment by a verdict of a Jury and he having answered all questions under oath, and the defendant having had two days notice of sentence (472-CCP); now on being arraigned for sentence and being asked if he had any legal cause to show why judgment should not be pronounced against him (480-CCP) and the defendant answering in the negative it is

ORDERED AND ADJUDGED by the Court, that the said Viven Harris for the offense of Feloniously selling narcotic drug in violation 3305 P.H.L. and 1751 subd. 1 Penal Law, 2nd ct. of Indict. #50-66, whereof he is convicted, be imprisoned in the Sing Sing State Prison at Ossining, N.Y. at hard labor, under an indeterminate sentence, the Maximum of such imprisonment to be 8 YEARS and the Minimum to be 6 YEARS.

AND IT IS FURTHER ORDERED, that the sheriff of Westchester County convey the said defendant to the Sing Sing State Prison of Ossining, N.Y. with conformity of this sentence.

COUNTY COURT : WESTCHESTER COUNTY

INDICTMENT 50-66

THE PEOPLE OF THE STATE OF NEW YORK

—against—

VIVEN HARRIS, DEFENDANT

THE GRAND JURY OF THE COUNTY OF WESTCHESTER, by this Indictment, accuse the defendant of the crime of FELONIOUSLY SELLING A NARCOTIC DRUG, IN VIOLATION OF SECTION 3305 OF THE PUBLIC HEALTH LAW AND SECTION 1751 SUBDIVISION 1 OF THE PENAL LAW, committed as follows:

The defendant, in the City of New Rochelle, County of Westchester and State of New York, on or about the 4th day of January, 1966, unlawfully bartered and exchanged with, and sold, gave and offered to give to another a quantity of a narcotic drug, to wit, a quantity of heroin.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuse the defendant of the crime of FELONIOUSLY SELLING A NARCOTIC DRUG, IN VIOLATION OF SECTION 3305 OF THE PUBLIC HEALTH LAW AND SECTION 1751 SUBDIVISION 1 OF THE PENAL LAW, committed as follows:

The said defendant, in the City of New Rochelle, County of Westchester and State of New York, on or about the 6th day of January, 1966, unlawfully bartered and exchanged with, and sold, gave and offered to give to another a quantity of a narcotic drug, to wit, a quantity of heroin.

All of the acts and transactions alleged in each of the several Counts of this Indictment are connected together and constitute parts of a common scheme and plan.

All contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

/s/ LEONARD RUBENFELD
District Attorney of
Westchester County

50-66

WESTCHESTER COUNTY
COUNTY COURT

Filed the ..... day of

Pleads

THE PEOPLE OF THE STATE OF NEW YORK

against

VIVEN HARRIS

Fel. Sell, Narcotic Drug, Viol. § 3305 Public Health Law, Viol. 1751 Sdiv. 1 Penal Law (2 Counts)

/s/ LEONARD RUBENFELD
District Attorney

A TRUE BILL

/s/ MARTIN H. SHERWIN
Foreman of Grand Jury

VOLUME II

COUNTY COURT : WESTCHESTER COUNTY

Indictment #50-66

THE PEOPLE OF THE STATE OF NEW YORK

—against—

VIVEN HARRIS, DEFENDANT

* * * *

[fol. 388] VIVEN HARRIS, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

BY THE CLERK:

Q Would you state and spell your name for the Court, please?
A Viven Harris, Viven, Harris.
Q And your address?
A 34 Lincoln Avenue, New Rochelle.

DIRECT EXAMINATION BY MR. PROJANSKY

Q Viven, how old are you?
A 24
Q Now, would you speak up and make your voice loud and clear so that every member of the jury can hear you.
A Yes, sir.
Q Now, where were you born?
A Greensboro, North Carolina.
Q Where did you grow up?
A Greensboro, North Carolina.
Q Did you attend school there?
A I did.
Q And far did you go in school?
A Tenth grade.
Q Are you married?
[fol. 389] A I am.
Q Do you have a family?
A I do.

Q Any children?
A Yes, sir. One.
Q Now, did there come a time when you moved away from Greensboro, North Carolina?
A Yes, sir.
Q When was that?
A About 1962.
Q And where did you move to?
A New Rochelle.
Q And have you lived in New Rochelle ever since then?
A No, sir.
Q Where else have you lived?
A North Carolina, from numerous times, from North Carolina back to New Rochelle.
Q You've moved back and forth?
A Back and Forth.
Q Now Viven, have you ever been convicted of a crime?
A I have.
Q And what was that crime?
A Possession of a weapon.
Q And where were you convicted of that?
[fol. 390] A Greensboro, North Carolina.
Q Have you ever been convicted of any other crime in North Carolina?
A I have.
Q What was that for?
A Escape.
Q From a sentence that you were serving?
A Yes, sir.
Q Have you ever been convicted of any other crime?
A Yes, sir.
Q And where was that?
A Here in New Rochelle, here in White Plains, here in this Court.
Q And when was that?
A Approximately, I believe, May or June 1.
Q Of this year?
A Of this year.
Q And what was that conviction for?

A Possession of a weapon.
Q Now, you saw Detective Bermudez testify in this Courtroom, did you not?
A I did.
Q Did you know Detective Bermudez before he came here to testify?
[fol. 391] A I had saw him.
Q Had you ever met him before?
A Yes, sir, I have.
Q When did you first meet him?
A Oh, around about—it was about the 4th of January.
Q Have you ever seen him before that time?
A I had.
Q Where had you seen him?
A Sickles Avenue.
THE COURT: Where?
THE WITNESS: Sickles Avenue in New Rochelle.
Q When did you first have a conversation with Detective Bermudez?
A The 4th of January.
Q And where did that conversation take place?
A Three-Fours Bar and Grill.
Q On North Avenue in New Rochelle?
A North Avenue, 444 North Avenue.
Q Do you remember about what time of day that was?
A No, sir. I can't remember.
Q Well, was it in the morning, evening, afternoon?
A It was in the evening.
Q Pardon me?
A It was in the evening.
[fol. 392] Q Early or late in the evening?
A I say around about 5:30, maybe 6:00.
Q And was that inside the Three-Fours or outside?
A Inside.
Q And who else was present?
A At this time, Charlie Burkes was present, and Ronnie Sykes.
Q By the way, did you know Detective Bermudez by that name at that time?

A No, sir.
Q What was the name by which you knew him?
A Well, when they introduced me to him that day, they were calling him Joe.
Q Did you know him by any last name?
A No, sir.
Q And what was the substance of that conversation? What he said and what you said?
A Well, I can't remember the exact conversation, it was just small talk and everything.
Q And did there come a time when the subject of narcotics was discussed?
A Not in my presence, no, sir.
Q You never talked about narcotics with him at that time?
A No, sir.
[fol. 393] Q Did Detective Bermudez ever ask you to go buy narcotics for him?
A Yes, sir.
Q Was it at that time?
A No, sir.
Q Was it on that day?
A It was on that day, not that time.
Q And did there come a time when you left the Three-Fours?
A Yes, sir.
Q And about when was that?
A Oh, about 7:00.
Q And did you have another conversation with him at sometime after that?
A No, sir, not as I can recall.
Q Well—
MR. FACELLE: I'm sorry, I didn't hear the answer, Your Honor.
A No, sir.
THE COURT: Not that he can recall.
MR. FACELLE: Thank you.
Q Now, you testified that you had a conversation with him?
A Yes, sir.

Q About narcotics, sometime on the 4th of January?
A Yes, sir.
[fol. 394] Q Now, about what time was that?
A Approximately, maybe 6:00, 6:30, somewhere along there.
Q And where were you at that time?
A Three-Fours Bar and Grill.
Q And what did he say and what did you say?
A Well, he wanted me to go and see could I obtain a bag of drugs for him. I told him that it was a panic on, that I wanted drugs for myself and could no drugs be found nowhere because I was drinking Robitussin A. C.
Q What is that?
A It's cough syrup with codeine in it.
Q Let me stop just a moment and go back. Were you using narcotics at that time?
A I was.
Q Now, for how long had you been using narcotics, when did you first begin?
MR. FACELLE: Objection, Your Honor, as to materiality.
THE COURT: No, I will allow it.
A You mean how many years or—
Q Yes, when did you first begin using narcotics?
A Oh, I say about 1961.
Q That was in North Carolina?
A North Carolina.
[fol. 395] Q And did you subsequently, did you after that time become addicted to narcotics?
A I have, quite a few times.
Q You say quite a few times. Were there any times between the time that you began using narcotics and January of this year, that you were not addicted?
A I started around about June, you know, just taking a shot, maybe on the weekend, and it built up to around about to the middle of December, I had a habit.
Q That's December of 1965?
A Yes, sir.
Q All right. Let's go back to the Three-Fours, the 4th of January of this year.
A All right.

Q Now, you said that, I believe, that he had asked you to go obtain drugs for him?

A He did.

Q And what did you say to that?

A That it was a panic on, that I was trying to get drugs for myself and that couldn't be done.

Q And what happened after that?

A Well, he kept asking me, asking, asking, and I kept telling him we couldn't buy no drugs because it was a panic on, it wasn't no drugs to be found, because I needed them for myself.

[fol. 396] Q And what happened after that?

A Well, just a little more small talk and I left.

Q I'm sorry, you'll have to speak up a little louder.

A A little more small talk and things, and things like that, and he bought me a beer, and I left and went to the Red Rose Bar up on Huguenot Street.

Q And did you ever buy drugs for him?

A No, sir.

Q You say that you had seen Detective Bermudez before the 4th of January, is that right?

A I have.

Q And who was it that introduced you to him?

A No one introduced me to him, I had just saw him. He had never been introduced to me, but he was in his car with Ronnie Sykes and I believe Detective Parks was in the car, too, I'm not sure, because this was about in the middle of December.

Q And what happened at that point?

A Well, it was, as I can recall, it was Al Payne which was Alvin Mills, and Ambrose Rooney, and I was, you know, scrape up enough money to buy one bag of heroine for three of us, and he went, he come around the corner on Sickles Avenue, he asked Ronnie to ask one of us to see could we cop a bag of drugs for him. Cop means to guy a bag of drugs for him, which one of the boys did so.

[fol. 397] MR. FACELLE: If Your Honor please, may we have a time or date, approximate date established?

THE COURT: Yes, I think you can fix it, Mr. Projansky.

Q When did this occur?
A It was round about in the middle of December. The date I'm not sure.
Q What time of day?
A It was mostly, it was at night.
Q Yes, go on, what happened?
A Well, he gave Ronnie Sykes the money to give to, I believe it was—Ambrose Rooney. And so when we went to this here—
Q Excuse me just a moment, where was Detective Bermudez at the time?
A He was in his car.
Q And where was Ronnie Sykes?
A In the car.
Q And where was Ambrose Rooney?
A Ambrose Rooney, Alvin Mills and I was standing on the sidewalk.
Q Would you speak up a little louder?
A Ambrose Rooney, Ambrose Rooney,—
Q Yes.
A Ambrose and Alvin Mills and I were standing on [fol. 398] the sidewalk. Mr. Bermudez and Detective Parks and Ronnie Sykes was in the car.
Q Yes. And what happened after he gave Ronnie Sykes the money?
A He handed it to—I can not remember this good, but I believe it was Ambrose Rooney, I believe it was Ambrose Rooney.
Q Yes, and what happened next?
A To obtain a bag of drugs for him. He handed him seven dollars, and so we went in—
MR. FACELLE: If Your Honor please, at this time I'm going to object to this line of questioning as having no relevancy or materiality on the issue here before the Court.
THE COURT: I will allow it, Mr. Facelle.
A (Continuing) He handed him the money which we—he handed him the seven dollars, to obtain the drugs for him, and which we had seven dollars to obtain the bag of drugs for us. So we went into—we rung the bell. The boy comes to the door, he said he have respectable peoples living there.

Q Who said this?
A This was the Spanish boy. We called him Joe.
Q What house was this?
A It was on Stickles Avenue.
Q Do you know the number?
[fol. 399] A I believe it was 108 Sickles.
Q And where did this take place, at the front door?
A This time he say he have respectable peoples living there and if we come in, you know, we didn't want to walk around, not to disturb, not to make too much noise.
Q Yes, and what happened then?
A So since it was three of us getting out on one bag, the bag that we had, you know, bought for Mr. Bermudez, we decided to just take some of the powder, the heroin out of his bag and put in our bag so it would be more for us and less for him.
Q And what happened then?
A We come back out, we come out of the house, he asked, "Did you get it? Did you get it?" and he handed the bag to Ronnie Sykes.
Q Who handed the bags to Ronnie Sykes?
A I believe it was Rooney, Ambrose Rooney who handed the bag to Ronnie Sykes, which Ronnie Sykes handed it to Joe, which they called Detective Bermudez.
Q And what happened then?
A And then they drove off and we went and use it, used the drugs that we had.
Q Now, after the 4th of January, did you ever have another conversation with Detective Bermudez?
A I did.
[fol. 400] Q And when was that?
A The Three-Fours Bar and Grill.
Q And when was that?
A On a Thursday, I believe it was. I'm not quite sure of the day; I believe it was on a Thursday.
MR. PROJANSKY: Your Honor, may we take judicial notice that the sixth of January was a Thursday.
THE COURT: No, you may ask the witness whether this might be such a date.
Q Let me ask you this, Viven, you were arrested in the month of January, were you not?

A I was.
Q Do you remember the date?
A Yes, sir. It was the 7th of January.
Q And what day of the week was that, do you recall?
A It was Friday.
Q And then the day before that—
A It was—
Q It would be a Thursday, is that right?
A That's right, that's right; that's correct.
Q Now, how many days after the 4th of January was it before you saw Detective Bermudez again.
A Oh, it was on the 6th, as you say.
Q Now, you say that you met him in the Three-Fours?
[fol. 401] A Yes, sir.
Q About what time of day was that?
A It was in the afternoon, around about, well I cannot say exact time because—
Q As best as you can recall?
A The best I can recall, it was about 7:30.
Q In the early evening?
A In the early evening.
Q And who else was present? That is if anyone, besides yourself and Bermudez?
A You see, usually we be talking to Charlie Burkes, was Charlie Burkes was working as a waitress—a waiter.
Q And was he present at that time?
A He was.
Q And was anyone else there?
A Detective Parks was present but he was not talking to—he was not with Detective Bermudez and Charlies Burkes at that time.
Q And where in the Three-Fours did you meet Detective Bermudez?
A It was mostly—
Q At that time?
A At the back, mostly at the back, close—you see, it's two sections in the Three-Fours. One section of the Three-Fours is where at the bar where you can drink.

[fol. 402] In the back of the Three-Fours they have tables where you can sit down, drink, and dance and have a band.

Q And do you recall the substance of the conversation that you had with Detective Bermudez?

A I do.

Q And what was the substance of that conversation?

A He wanted drugs.

Q What did he say about drugs?

A First he wanted me to see could I cop him a half-a-load of drugs? A half-a-load which is equal to fifteen tray bags, fifteen three dollar bags.

Q And what did you say to him?

A I told him it was a panic on, you couldn't buy no drugs.

Q And what happened then?

A Well, he said, "Could you buy me two bags of drugs?"

Q And what happened then?

A I told him still there is a panic on.

Q And what happened after that?

A Well, one thing, this when my—a friend of mine come in the bar.

Q Who was that?

A Henry Stanley.

Q Stanley?

A Henry Stanley.

Q And then what happened?

[fol. 403] A Well, he come up and he start talking, Bermudez, Mr. Bermudez, Detective Bermudez turned around and asked him. "You understand, you a friend of Viven?" and told him he was. He said, "Well, birds of a feather flock together. You know where you can get some drugs at?" and Henry told him the same thing, it's a panic on, that we was drinking terpin hydrate and robitussin A. C.

Q Cough medicine?

A Cough medicine.

Q What happened then?

A Well, he kept asking him, kept asking him and insisting, so Henry punch me in the side.

Q He what?
A Punch me.
Q What do you mean by that?
A To call me to the side.
Q Yes.
A Wanted to talk to me. So—
Q Did you have a conversation with him?
A I did.
Q And what was that conversation?
MR. FACELLE: Objection, Your Honor.
THE COURT: I will sustain the objection, Mr. Projansky. It's out of the—
[fol. 404] MR. PROJANSKY: Your Honor, I believe this goes directly to the state of mind of the witness at that time.
THE COURT: No, I will sustain the objection, not in the presence of any parties here.
Q You had a conversation with Henry Stanley at that time, is that right?
A Yes, sir.
Q And that time—as a result of that conversation, did you decide to do something?
MR. FACELLE: Objection, Your Honor, to the form of the question.
THE COURT: Not what you decided to do, did he do anything as a result of the conversation.
MR. PROJANSKY: Your Honor, as with—
THE COURT: You are describing a mental operation of the witness, Mr. Projansky. You may ask the witness as a result of this conversation, if he did anything.
MR. PROJANSKY: Excuse me, Your Honor. If I may be heard on this point, the indictment states that the alleged crime herein was committed wilfully and feloniously and I believe the state of mind of the defendant is always a key issue as to those allegations.
THE COURT: Yes, I have already ruled on the objection. I will again repeat, I will sustain the objection, [fol. 405] but you may ask the witness to state what he did as a result of this conversation.

Q As a result of that conversation, with Henry Stanley, what did you do, if anything?
A We beat it.
Q What do you mean by that?
A We gave him baking powder instead of heroine.
Q After you had that conversation with Henry Stanley, did you leave the bar?
A Yes, sir, we did.
Q And where did you go?
A To Henry's house.
Q And what did you do there?
A That's where we were going to try—
MR. FACELLE: Objection, Your Honor.
THE COURT: I will let him describe this, what he did.
MR. FACELLE: He said that's why we tried—and that's what I'm objecting to.
THE COURT: That's where. That's where.

(Whereupon the testimony referred to was read back by the court reporter.)

Q Speak up now so everyone can hear.
A We, Bermudez, Detective Bermudez has been de-
[fol. 406] posing himself as a snorter.
Q Yes.
A We know if he's a snorter, if he snorts something—
MR. FACELLE: Objection, Your Honor, as to what they know.
THE COURT: No, I will allow it.
A If they know they snort something and it doesn't have a sting to it, then it's not heroine, but if you snort something that has a sting to it, he doesn't he been beat until about maybe fifteen or twenty minutes later. So first we tried a baby formula which mixed—mixed with milk, we tried that but it didn't have the sting.
Q That's some powdered substance?
A Powdered substance, white powdered substance. Then we tried baking powder.
Q Excuse me, when you say you tried, what do you mean you tried?
A We snorted it.

Q That's drew it up into your nostrils?
A That's right.
Q You say it didn't have a sting?
A Didn't have a sting.
Q So what did you do then?
A Well, we tried baking powder.
[fol. 407] Q Yes.
A Well, that had just the right amount of sting, so he had two glassine envelopes which he had previous used—which he had previous, you know, had use the heroine from.
Q Yes?
A So we put them in that and taking it back to the Three-Fours.
MR. FACELLE: May we establish, Your Honor, who did this?
THE COURT: He and his friend went to a house and they took some baking powder and put it in two glassine envelopes and went back to the Three-Fours Club, is this your testimony?
THE WITNESS: Yes, sir.
THE COURT: That's what I thought.

DIRECT EXAMINATION CONTINUING BY MR. PROJANSKY

Q What happened then?
A We gave it to him.
Q To whom?
A To Bermudez.
Q When you—was that inside the Three-Fours?
A Yes, sir.
Q Did you have any conversation with him at that time?
A No, sir. I was kind of sick and since I had—
MR. FACELLE: Objection, Your Honor.
[fol. 408] THE COURT: Yes. Beyond that said he had no—
THE WITNESS: Well—
THE COURT: They had no conversation with him.
Q Did you say anything to him at all?

A No more, you understand, that, you know, we didn't want the man to think—

THE COURT: No, Mr. Harris, did you have any conversation when you went back?

THE WITNESS: I did.

THE COURT: You did?

THE WITNESS: I did.

THE COURT: This is what Mr. Projansky asked you, what you said and what did he say.

THE WITNESS: Well, first we asked him to buy a beer.

Q Yes?

A You understand, we asked to buy a beer. We did not want the man to know that—

MR. FACELLE: Objection, Your Honor, as to what they wanted the man to do.

THE COURT: I will allow it.

A (continuing) He bought us the beer.

Q Yes, and did you have any conversation with him at that time?

A We did.

[fol. 409] Q Did you talk about the drugs?

A Well, I told him, you understand, that the drugs that we would give him, you understand, was the best we could do and might be a little light.

Q What do you mean by a little light?

A Might not give him the full effect.

Q And was there—did you put any heroine in these envelopes?

A No, sir.

Q Were they emptied before you put the baking powder in?

A Yes, sir.

Q And after you had that conversation, what happened?

A Well, he bought us the beer.

Q Yes?

A And so, well, since I was sick, Henry was sick, we had a few dollars, about four dollars between us, we were going to go downtown and try to buy ourselves some drugs then, since we had his money.

Q Did he pay you for those drugs?
A He paid twelve dollars.
Q And did you go to New York?
A We did.
Q When was the next time that you saw Detective Bermudez?
A The next day I was arrested.
[fol. 410] Q Did you ever sell Detective Bermudez any drugs?
A No, sir.
Q Did you ever sell anyone any drugs?
A No, sir.
Q Have you ever been in the business of selling drugs?
A No, sir.
Q Have you ever had a partnership, a business arrangement—
A No, sir.
Q —with Al Payne?
A No, sir.
Q With Wayne Baker?
A No, sir.
Q With Benny Lawson?
A No, sir.
Q Now, you stated that you started using drugs around 1961?
A Yes, sir.
Q Have you ever given drugs to anyone?
A I have.
Q Did you give drugs to anyone on the 4th of January?
A No, sir.
Q Did you give drugs to anyone on the 6th?
A No, sir.
Q Now, what kind of physical condition are you in at this time?
[fol. 411] THE COURT: Sustain an objection.
MR. FACELLE: Thank you, Your Honor.
MR. PROJANSKY: Excuse me, Your Honor, I believe the defendant's demeanor is always in evidence, if he can explain it then I believe—

THE COURT: No.

MR. PROJANSKY: —he's entitled to it.

THE COURT: No, please. I will sustain an objection.

Q Before the 4th of January, had anyone ever told you anything about the man that you knew as Joe?

MR. FACELLE: Objection, Your Honor.

THE COURT: He may answer yes or no.

A Yes.

Q And do you remember what that was?

A I cannot recall the date, no, sir.

Q Was it in the month of December?

A Yes, sir.

Q Was it before or after Christmas?

A Before.

Q And who told you anything about Joe?

THE COURT: I will sustain the objection.

MR. PROJANSKY: I didn't hear an objection, Your Honor. I want to know what the grounds—

MR. FACELLE: Objection, Your Honor.

THE COURT: On the grounds that the question is irrelevant and immaterial.

[fol. 412] Q You stated that you had heard that Detective Bermudez was a snorter?

A Yes, sir.

Q And who told you that?

MR. FACELLE: Objection, Your Honor.

THE COURT: Yes, I will sustain the objection.

MR. PROJANSKY: Your Honor, that's certainly material, it seems to me.

THE COURT: No, it isn't.

Q At that time, the 4th of January, did you know then that it was a crime to sell drugs?

A Yes, sir.

Q But you didn't know Detective Bermudez, did you?

A Not personally.

Q Were you suspicious of Detective Bermudez?

THE COURT: I'm sorry, I didn't hear, Mr. Projansky.

(The question was read back by the court reporter.)

MR. FACELLE: Objection, Your Honor.
THE COURT: I will sustain an objection to it, sir.
Q Were you addicted to drugs at that time?
A I was.
Q Had you ever discussed drugs with strangers?
A No, sir.
[fol. 413] Q Now, on the 4th of January, did you have a conversation—with John? Did anyone ever tell you that Detective Bermudez had used drugs?
MR. FACELLE: Objection.
THE COURT: I will sustain the objection.
MR. PROJANSKY: Your Honor, I submit that, throughout, the state of mind of the defendant is very much in issue.
THE COURT: No.
MR. PROJANSKY: It's something I believe the jury is entitled to—
THE COURT: The jury will determine the state of mind of the defendant. He has already testified as to the transactions which he says, if in fact they occurred, did occur. It will be the jury that will determine what transpired on January 4th and January 6th. What he thought on January 8th of December 25th, in this Court's opinion, is utterly irrelevant and I will sustain an objection to that line of questioning.
MR. PROJANSKY: Your Honor—
THE COURT: It is going to be what the defendant intended to do, if in fact he intended to do anything, on January 4th and on January 6th.
MR. PROJANSKY: I'm not speaking in regard to intent, Your Honor.
[fol. 414] THE COURT: Then the defendant's state of mind does not become relevant in this type of a case, sir.
MR. PROJANSKY: I have no further questions, Your Honor.

CROSS EXAMINATION BY MR. FACELLE

Q Mr. Harris, in December of '65 or January of '66, were you employed?
A Up to around December 3rd, I believe.

Q You were employed up to December 3rd?
A I believe so.
Q And you were not from December 3rd until January 7th?
A The 7th of January? I don't think so.
Q Were you or weren't you?
A No, I wasn't.
Q Were you living with your wife and your child at the time?
A I was.
Q Where were you living?
A 149 Guion.
Q The City of New Rochelle, is that right?
A That's right.
Q And prior to December 3rd, where were you employed?
A Fred Magneri Landscaping Gardner.
Q Now, this weapon that you say you were convicted [fol. 415] of possessing, what was the date that you possessed that weapon to which you pleaded guilty in New Rochelle?
A I cannot recall the date.
Q Would it refresh your recollection, Mr. Harris, if I mentioned to you the date of December 11th, 1965? Would that refresh your recollection?
A Is that the date I was convicted?
Q Not the date that you were convicted, the date that you admitted that you possessed this weapon.
A I admitted possession of weapon when I pleaded guilty to a case.
Q Did you plead guilty to possessing a weapon on December 11th, 1965? Not that you pleaded on that date, but that you possessed the weapon on that date?
A I did possess a weapon on that date.
Q And what type of a weapon was that?
A A knife.
Q And is it not a fact, Mr. Harris, that with that knife you stabbed one Gus Fowler in your apartment?
A I cut Gus Fowler, that's right.
Q And is it not a fact that that stabbing of Gus Fowler was in a dispute over drugs?

A No, sir.
Q It was not?
A No, sir.
[fol. 416] Q Where did you stab him?
A In my house.
Q Where did you stab Gus Fowler, what part of his body?
A I did not stab him, I cut him.
Q Where did you cut him?
A Across the chest.
Q Part of the chest?
A Part of the chest.
Q And is it not a fact that you broke the blade of the knife in the cutting?
MR. PROJANSKY: I'm going to object, Your Honor. The defendant's already admitted the act.
THE WITNESS: Can I ask a question?
MR. PROJANSKY: And I believe that since the details of that act certainly are not in issue here, and since the defendant has admitted that the District Attorney—
THE COURT: Does the law permit on cross examination interrogation as to the circumstances as to the crime?
MR. PROJANSKY: I don't believe so, Your Honor. He's already admitted.
THE COURT: Well, I think—excuse me, I will overrule your objection.
MR. PROJANSKY: May we have a limiting instruction.
[fol. 417] THE COURT: You may continue, Mr. Facelle, and you may have an exception, Mr. Projansky.
MR. PROJANSKY: May we have a limited instruction as to this type of testimony?
THE COURT: The cross-examiner is never restricted to the mere admission of the commission of the crime. He may, at his option, go into the details thereon, so I will overrule your objection, sir.
MR. PROJANSKY: May we have an instruction to the jury, as for what purposes they may consider this evidence?

THE COURT: You interrogated the jury, the jury understands that this goes to the credibility of the witness, and not as to evidence of guilt of the commission of this crime. It simply goes to the issue of the witness' credibility and I am sure the jury understands that now.

CROSS EXAMINATION CONTINUING BY MR. FACELLE:

Q Mr. Harris, I believe you said that the first time that you spoke to the Detective Bermudez was on the 4th of January, is that correct?

A That's right.

Q In the Three-Fours?

A Three-Fours.

Q And Charlie Burkes and Ronnie Sykes were present?

[fol. 418] A That's right.

Q Did anybody introduce you to Detective Bermudez?

A Charlie Burkes.

Q He introduced you?

A Introduced me.

Q Did you not have a conversation with Detective Bermudez at that time about a guitar?

A No, sir.

Q No conversation whatsoever?

A No conversation whatsoever.

Q Did you sell a guitar to Detective Bermudez?

A No, sir.

THE COURT: I'm sorry, I didn't hear the answer.

A No, sir.

Q Did you, Mr. Harris, steal a Kent guitar in a carrying case with a blue and white tag with a number WTG, 67066, from Grant's in the City of New Rochelle?

A No, sir.

Q Did you sell a guitar for $25.00 to Detective Bermudez on the 4th of January?

A No, sir.

Q At any time, Mr. Harris, was Detective Bermudez ever in your apartment?

A No, sir.

Q At any time did Detective Bermudez ever meet your wife?

[fol. 419] A No, sir.

Q At any time did you ever have any conversations with Charlie Burkes and Detective Bermudez about buying a guitar which was hot?

A No, sir.

Q Do you understand what I mean by hot, Mr. Harris?

A I understand what you mean by hot.

Q What was the first time you had a conversation, discussion with Detective Bermudez about drugs?

A Drugs. The 4th of January.

Q And what was that discussion, again?

A He wanted me to purchase some drugs for him, which I told him that I could not because it was a panic on.

Q Well, had you told Detective Bermudez that you were a user of drugs?

A Had I ever told him that I used—

Q At that point, before he asked you to buy drugs for him, had you ever told Detective Bermudez that you used drugs.

A No, sir.

Q Did he ever see you use drugs?

A No, sir.

Q Up to that point? And I believe you testified on Direct that you never discussed drugs with strangers, is that right?

A That's right.

Q So that Detective Bermudez, then, not knowing [fol. 420] that you ever were a user of drugs—

A That's right.

MR. PROJANSKY: Objection, Your Honor, that's not what the witness said. He said that he didn't tell him that.

Q You never told him you used drugs? You never used drugs in his presence?

A That's right.

Q Asked you to buy drugs for him?

A That's right.

Q And you say there was a panic on?
A That's right.
Q That you couldn't any?
A I didn't say I didn't use it, I said it was a panic on and that I needed drugs, but it was a panic on, you could not get no drugs.
Q Did you tell him that you couldn't even get drugs for yourself?
A That's right.
Q So that on the 4th day of January, 1966, Mr. Harris, did you sell anything to Detective Bermudez?
A No, sir.
Q On the 4th day of January you didn't even make up this bag of baking soda or whatever it was that you concocted on the 6th?
[fol. 421] A No, sir.
Q You passed absolutely nothing to this Detective for which you received any money?
A Nothing.
Q Now Mr. Harris, referring to People's Exhibit 2, just the little glassine bag, not the brown tapes, did you ever see that before you appeared in court?
A I have saw bags similar to these.
Q That bag?
A I've saw you all handle this in court.
Q Listen to my question. Did you ever see that bag, that one?
A Before coming to Court?
Q That's right.
A No, sir.
Q And of course you did not sell that bag to Detective Bermudez?
A That's right.
Q You didn't sell anything to him or you didn't give anything to him?
A That's right.
Q You gave him the narcotics?
A That's right.
Q You have him no bag that contained any substance that even looked like narcotics?

[fol. 422] Q Did you have any conversation with him relative to half-loads at that time?

A I was—he wanted to buy a half-load. You cannot buy half-loads—

Q Please answer my question. Did you have any conversation with him at that time about half-loads?

MR. PROJANSKY: He's answered that, Your Honor. He's given the substance of the conversation.

THE COURT: You may answer the question, Mr. Harris.

A Hee wanted to buy half-loads. He wanted us to go to New York and buy him half-loads. It was no half-loads, it was no dope, or nothing present. It was a panic on.

Q Because of the panic. I see. And you told him you couldn't do it?

A Couldn't do it.

Q Did you have any further conversation with him on that day about narcotics?

A No, sir.

Q By the way, did you ever personally see Detective Bermudez or Detective Parks snort drugs?

A Not I, myself, no, sir.

Q Or snorting what would appear to be drugs?

A No, sir, I didn't.

Q You do know Al Payne, do you not?

[fol. 423] A I do.

Q What's his real name, true name?

A Alvin Mills, I believe.

Q Pardon?

A I believe it's Alvin Mills, I'm not for sure.

Q Did you see Al Payne or Alvin Mills on the night of January 4th, 1966?

A No, sir.

Q Did you stop around to the pool room that night?

A No, sir, I was at the Red Rose.

Q You were at the Red Rose. But you didn't see Al Payne at the pool room at all that night?

A No, sir.

Q You're quite sure?

A I'm—I'm quite sure.

Q How long have you known Al Payne?
A Oh, about two years.
Q How long have you known Ambrose Rooney?
A About a year and a half.
Q How long have you known Wayne Baker?
A Same, about a year and a half, two years maybe.
Q How long have you known Ronnie Sykes?
A About a year.
Q By the way, this address to which you made reference, 108 Sickles Avenues, about the transaction with [fol. 424] Ambrose Rooney, et cetera, you say that took place in front of 108 Sickles Avenue?
A It did.
Q Do you know any people that live at 108 Sickles Avenue?
A I didn't know one personally who lived there.
Q Mr. Harris, do you know Benny Lawson?
A I know Benny Lawson.
Q Yes. Do you know where Benny Lawson lives?
A I know he stay on Sickle Avenue, but I don't know if it's 108 or not?
Q You've never been in his apartment?
A No, sir.
Q Now, after the 4th of January, you say you didn't have any other conversations with Detective Bermudez until the night of January the 6th, is that right?
A That's right.
Q And that was a Thursday night. Where did you meet him?
A Three-Fours Bar and Grill.
Q Tell us about the conversation again.
A Well, it was small talk at first, and—understand? So Charlie Burkes and I was there. He wanted to purchase two bags of heroine.
Q First he wanted to buy a half-load, right, on the night of the 6th. Isn't that what you testified to on direct?
A He wanted two bags of heroine.
[fol. 425] Q Let me ask you this, Mr. Harris. Didn't he first ask you again on the night of the 6th to purchase a half-load for him and then settle for two bags?

A He might have.
Q Well, did you tell this Court on direct that you had conversation about a half-a-load on the night of the 6th?
A Mostly everytime I saw Mr. Bermudez he wanted as half-a-load.
Q You only saw him twice?
A That's right.
Q Before his arrest?
A Not twice, correction, three times.
Q You had conversations with him twice?
A Twice, that's right.
Q And you say the first time he discussed a half-load with you and on the 6th he discussed a half-a-load also?
A That's right.
Q But you say you couldn't get it, there was a panic on?
A Panic on.
Q And tell us about the rest of the conversation.
A Well, since it was a panic on and everything, we was talking, he was begging for the drugs; he had a way of convincing peoples—
Q Not—please tell us what the conversation was.
[fol. 426] A The conversation was relative to drugs. It was small talk about drugs. That's when Henry Stanley come in.
Q By the way, who—where does Henry Stanley live?
A At the present, I do not know.
Q Well, did you know where he lived on January 7th, 1966?
A If you—I mean I know the house, but you get a map I can point out the street to you.
Q Well—
A But I do not know the street.
Q Not to me, Mr. Harris, do you know where he lives?
A I know where he lives.
Q Do you know where he lives today?
A I do not.
Q Did you know where he lived on January 7th, 1966?

A I did.
Q Do you know where he works?
A I do not think he was working.
Q Pardon?
A I do not think that he was working at the time.
Q By the way, do you know the name of the street that he lives on?
A No, sir, I do not know the name of the street.
[fol. 427] That's what I say, if you get me a map, I will point out the street; map of New Rochelle, I will show you the street.
Q He lives in the City of New Rochelle?
A He do.
Q You don't know where he works?
A No.
Q Is he married?
A Yes, he is.
Q How old is he?
A I say round about 25, 27.
Q How tall is he?
A Maybe about six, six and a half, six-one. Maybe about six, six and a half or six-one.
Q All right. And what else can you tell us about him?
A Only thing I can tell you about it, that he's a hustler, he uses drugs, he's a pool shark, he's a hustler.
Q How long had you known him?
A Henry?
Q Yes.
A Mostly ever since I come to New Rochelle.
Q How long is that?
A I come to New Rochelle in '62.
Q And Henry was present when all these conversations took place on the night of the 6th, is that right?
A Not when all the conversations took place, no, he was not present.
[fol. 428] Q Was he present when you had a conversation about a half-load?
A No, he was not.
Q Did you have a—when he present when you had the conversation with Bermudez about scoring the two bags?

MR. PROJANSKY: Objection, Your Honor. The witness didn't say anything about scoring two bags, Your Honor.

Q By purchasing the two bags?

A He come in, at the time that Mr. Bermudez was begging for someone to buy drugs for him. Buy it, I mean purchase drugs for him.

Q He came in and was present when Bermudez—

A He was asking this, he comes up to me, he knows me, and he knows Charlie, and he was usually be around the Three-Fours all the time.

Q Well, did he hang out at the Three-Fours, Stanley?

A Most of the time.

Q Was he around the Three-Fours almost every night?

A I wouldn't say because I was around the Three-Fours every night.

Q Well, would you usually see him in the Three-Fours when you were there?

MR. PROJANSKY: Objection, Your Honor, what he usually saw is immaterial.

[fol. 429] THE COURT: No, I will allow it on cross-examination, but reaching a point of irrelevancy, Mr. Facelle.

MR. FACELLE: If Your Honor please, may I be permitted to pursue this on the question of relevancy as to the location of this individual?

THE COURT: No, you have already explored that. Let's give him a map. He can show you where he lives.

MR. FACELLE: Referring to Defendant's E for identification.

Q Mr. Harris, do you recognize that as a map of the City of New Rochelle?

A Yes, sir, I do.

Q Can you please point out to us the street on which this Henry Stanley lives?

A As soon as I can find Guion Place.

Q Pardon?

A As soon as I can find Guion Place.

THE COURT: While the witness is looking, Mr. Foreman, we will take a recess at this time for five min-

utes. Please don't discuss this case nor form an opinion on it. We will take a recess of five minutes.

(Recess declared at 3:15 p.m.)

(Resuming at 3:43 p.m. The jury is present in the courtroom. The defendant and both counsel are present.)

[fol. 430] THE COURT: You were interrogating the witness to whom the map was given, Mr. Facelle.

MR. FACELLE: Yes.

(The witness defendant Viven Harris having been previously duly sworn, resumed the witness stand and testified further as follows:)

CROSS EXAMINATION CONTINUING
BY MR. FACELLE

Q Have you been able to locate the street that This Henry Stanley lives on?

A I have.

Q May we have it please? What's the name? Without marking the map, would you just tell us?

A Prior Street—Prince.

Q Prince Street?

A Prince Street.

Q Between what avenues, on what streets?

A That's between Lincoln and Sickles.

Q And what street?

A Sickles Avenue.

Q Sickles Avenue?

A That's right.

Q And on what side of the street does he live? Can you give us any landmarks, any buildings or places of business on the street that you can identify?

[fol. 431] A Well, it was a house he was living in, just been freshly moved there, it wasn't built, it was just moved there.

Q Is it a private house or an apartment?

A It's apartment.

Q An apartment house?

A It is.

Q How many apartments?
A I really couldn't say.
Q Pardon?
A I do not know.
Q Well, can you estimate?
MR. PROJANSKY: Your Honor, this is all immaterial, I think.
THE COURT: Yes, I will sustain it. I think we have explored it far enough.
MR. FACELLE: If Your Honor please, may I approach the bench with counsel? I'd rather not have the argument in the presence of the jury.
THE COURT: You don't even need to come up. I feel that it has gone far enough, Mr. Facelle, I will sustain the objection.
Q What was the color of the house?
A White.
Q Do you know the address?
[fol. 432] A No.
Q How many stories?
A I think it was two.
Q In the middle of the block or near a corner?
MR. PROJANSKY: Your Honor, I'll make the same objection.
THE COURT: Yes. I did sustain Mr. Projansky's objection a bit ago, and you are now pursuing it.
MR. FACELLE: If Your Honor please—
THE COURT: I'll sustain—
MR. FACELLE: I feel this is most material that we be able to try to locate—
THE COURT: I'll sustain—I will sustain the objection.
Q Have you seen Henry Stanley since January 7th, 1966?
A No, sir.
Q Now, after this conversaton you had relative to narcotics, with Detective Bermudez and Henry Stanley and Detective Bermudez said he wanted two bags, is that correct?
A That is correct?
Q And you had a conversation with Stanley after that?

A I did.

Q Where did you go?

A Well, we still in the Three-Fours. We just stepped about from Mr.—Detective Bermudez, a few feet away [fol. 433] from Detective Bermudez so he wouldn't overhear what we was talking about.

Q And how long did you talk privately with Henry Stanley?

A Oh, approximately two or three minutes.

Q And then where did you go?

A Start back to talk to Mr. Bermudez.

Q And what conversation did you have with him then?

A We told him that we might, you know, be able to come up with something.

Q How much?

A He wanted two bags.

Q So after all this conversation you had about the panic and you couldn't even get junk yourself, you came back and told him you might be able to do something for him. What did Bermudez say?

A Well, he act like he was kind of skeptical—

Q Now, how did he act, what did he say?

A First act like he was kind of skeptical and then he said okay.

Q And then what did you and Stanley say and/or do?

A We proceeded to Stanley's house.

Q Well, let's just take it step by step, Mr. Harris. You left the Three-Fours Bar and Grill.

A That's right.

Q Did you turn to the right or to the left?

[fol. 434] A We turned to the—come out of Three-Fours, it's on the corner, you turn to the left.

Q You walk to the corner of Sickles?

A Walked to the corner of Guion.

Q Guion and North, is that right?

A Guion and Lincoln.

Q All right. Let's take it from the beginning again, Mr. Harris, please. When you leave the Three-Fours, you were on North Street, is that correct?

A When you leave the Three-Fours, you're on North Avenue.

Q You say you went to the left and you walked to the corner?

A Come out of the Three-Fours, went to the left, made a right turn, that's Lincoln Avenue.

Q All right. You made a right turn at Lincoln and North, right?

A That's right.

Q All right, and then where did you walk to?

A Walked down to Guion.

Q Which is the block that you live on.?

A That was a block that I lived on?.

Q And then when you reached Lincoln and Guion, which way did you turn?

A We turn up—what's the name of the street, Rochelle Place—Remington.

[fol. 435] Q Make a left onto Remmington?

A Right.

Q All right.

A Cross the field, just cut across the field, across the field.

Q Yes, go ahead.

A Open fields. And you right there at his house, where he was standing.

Q Right there at Prince Street, is that right?

A Prince Street.

Q At his house?

A At his house.

Q And you went—where did you go when you arrived at his house?

A To his apartment. His apartment.

Q What floor was it on?

A Second.

Q Was anybody home?

A Not that I can recall.

Q How many rooms in the apartment?

A Well, I wouldn't—kitchen, bedroom and a bath, three rooms.

Q There was nobody home at the time?

A No, sir.

[fol. 436] Q What did you do in the apartment?

A That's when we proceeded to the—test baby formula and the baking powder thing, we tried to fool him.

Q You take some baby formula you say?a

A Baby formula.

Q And you and Stanley snorted some?

A That's right.

Q And you found that it didn't give the sting, is that right?

A Didn't give the sting.

Q Then you got some baking soda?

A That's right, powder.

Q Baking powder. And you both snorted the baking powder?

A That's right.

Q Did that give you the sting?

A We agreed on that.

Q What did you do with the baking powder?

A Well, he bagged it up.

Q What do you mean by bagged it up?

A He put it in two glassine envelopes.

Q Where did he get the glassine envelopes?

A Which he had previous used the heroine from.

Q What heroine?

A That he had used from.

Q This heroine that he had gotten before the panic [fol. 437] and you couldn't get any drugs you had to use robitussin A.C.?

A He heroine that he had got before the panic and we using robitussin A. C., then the envelopes that he put it in.

Q I see. And tell me, in all the years that you've been using drugs, Mr. Harris, had you ever saved the glassine bags after you used the drugs?

A Well, you don't never—

Q Not—have you ever saved, in all the years you've been using drugs, have you ever saved the glassine bags after you've used the heroine?

A You don't save them, you just leave them around, they had by laying around.

Q Did you ever save the bags or even have them laying around after you have used them?
A Yes, I've had them laying around after I've used them.
Q Just the empty bags?
A Just the empty bags laying around.
Q Was there anything in these bags that you placed this baking soda, this baking powder?
A No, sir.
Q Just plain empty bags?
A Plain, empty bags.
Q Mr. Harris, I ask you to take a look at People's Exhibit 3, just the two glassine bags, and I ask you, Mr. Harris, are these the glassine bags that you sold to De-
[fol. 438] tective Bermudez for twelve dollars?
A No, sir.
Q They are not?
A No, sir.
Q Positive?
A Positive.
Q How long did it take you to test this baby formula? The baking powder, bag it, snort, et cetera?
A Maybe fifteen, maybe twenty minutes, something like that?
Q And then what did you do?
A As I said, he proceeded to bag it up in two glassine envelopes.
Q And then you left?
A We left.
Q And where did you go?
A To the Three-Fours.
Q And you met Detective Bermudez again?
A We did.
Q Both of you?
A Both of us.
Q You had a conversation with Bermudez?
A We did.
Q All right, tell us about the conversation with Bermudez.
A Well, he asked us did we have the stuff? And so

[fol. 439] we didn't want, you know, seems suspicious, let him know thing that we was beating him or nothing, something like that, you know, so we asked him, "Yes, we got what you want. What about buying some beer?" So he bought us a beer.

Q That's both of you, you and Stanley?

A Bought both of us a beer.

Q Was Stanley present when you had the conversation about, "We have the stuff for you."?

A Stanley present?

Q Yes.

A He was present, yes.

Q He was present?

A He was present.

Q And where did you hand these glassine bags to him?

A I did not hand them to him.

Q Who handed it to him?

A Stanley.

Q Stanley had them all along?

A Stanley had them all along.

Q Where did Stanley hand them?

A In the Three-Fours.

Q At the bar?

A At the bar, you know how you—you make like you're just shaking hands or something, hand it to him. [fol. 440] How many people were in the bar at the time?

A Quite a few.

Q Quite a few, and this is where the pass took place?

A That right.

Q Was that where Detective Bermudez gave you the twelve dollars?

A It was.

Q You didn't go into the car with Detective Bermudez at that time, did you?

A No.

Q Where was Detective Parks?

A It was—see, it's two bars, one on one side to eat, another side you drink. Detective Parks was eating. He had

Q Did you see him?

A I saw him. He had on a black Russian—what you call it, cap or hat or something.

Q And at no time did you get in the car with Detective Bermudez this night?

A No time.

Q At anytime did you ever tell Detective Bermudez that you were out of action for a while but that now—you were back in action?

A No, sir.

Q You know what I mean by action, don't you?

A Yes, sir.

[fol. 441] Q What do I mean?

A By action?

Q Yes.

A That I'm selling drugs, right?

Q Yes.

A Well, I guess that's what you mean by action.

Q At any time did you ever tell Detective Bermudez that you had a partnership with Wayne and with Al Payne, and with—with Wayne and Al Payne?

A No, sir.

Q At any time did you ever ask Detective Bermudez to sell drugs to you in New Jersey?

A No, sir.

Q At any time did you ever tell Detective Parks or Detective Bermudez that you were selling drugs in Connecticut, New Rochelle, New York?

A No, sir. I don't know nothing about Connecticut, never been in my life.

Q By the way, when was it that you testified about going down with Gus Fowler and Rooney to buying the drugs for seven dollars of your own money and seven dollars that Bermudez gave you?

A I didn't testify that I went down with Gus Fowler and Rooney, I said I went down with Ambrose Rooney and Alvin Mills, which they called Al Payne.

[fol. 442] Q I see. You went down with Al Payne?

A That was on Sickles Avenue.

Q To buy drugs?

A That was on Sickles—we met him on Sickles Avenue.

Q And you say that you had seven dollars of your own money?

A We had seven dollars which—between us.

Q And he gave you seven dollars?

A He did not give me seven dollars?

Q Well, a member of his group, is that right?

A He gave a member of the group, he handed seven dollars to Ronnie Sykes, which Ronnie Sykes handed seven dollars to a member of the group.

Q When was this, again?

A Approximately in the middle of December.

Q About the middle of December, a few weeks before this incident of the 4th and the 6th of January, is that right?

A Few weeks before this incident.

Q Few weeks before January 4th and 6th?

A No, it had to be approximately in the middle of December, because right after that I left and went down south.

Q I see. But went down with Al Payne and Ambrose Rooney to buy drugs on that night, didn't you?

MR. PROJANSKY: Objection, Your Honor, he hasn't testified that he went down anywhere.

[fol. 443] THE COURT: I think you ought to let the witness clear it. Did you, Mr. Harris, are you saying that in the middle of December, 1965, you went down with some friends to buy drugs?

THE WITNESS: No. Yes, sir, we went.

THE COURT: You went down.

Q And you purchased drugs, didn't you?

A Well, for ourselves, we did.

Q Pardon?

A For ourselves, we did.

Q Was it a panic on then?

A It was.

Q There was a panic?

A It was a panic in December and January.

Q But you were able to get drugs that night, weren't you?

A We was.

Q You didn't have to use robitussin A. C., did you Mr. Harris?
A Not that night, no, we didn't. That's when drugs went up.
Q I'll ask the questions, please. Mr. Harris, did you ever sell drugs to Charlie Burkes?
A No, sir.
Q Percy Ellis?
[fol. 444] A No, sir.
Q Gus Fowler?
A Benny Lawson?
Q Mr. Harris, what cell block are you in in the jail?
A 2-A-5.
Q Have you ever discussed this case in the jail with Wayne Baker?
MR. PROJANSKY: Objection, Your Honor. That's completely immaterial.
MR. FACELLE: I submit, Your Honor, it's most material.
THE COURT: You may ask him, and he may answer whether he has. The next question I'll pass on, Mr. Projansky.
Q Have you ever discussed this case in the jail with Wayne Baker?
A I have.
Q Did you ever discuss this case in the jail with Luther Harris?
A No, sir, I've never been able to get next to him.
Q Have you or haven't you?
A No, sir.
Q Did you ever discuss this case in the jail with Benny Lawson?
MR. PROJANSKY: Your Honor, I'm going to object [fol. 445] to this entire line.
THE COURT: Yes, now I will sustain it, Mr. Facelle.
A I—
THE COURT: I will sustain the objection. I will sustain it. You are not going to answer, Mr. Harris.
Q Mr. Harris, do you know what skag is?
A It's used as drug, it's drug language.

THE COURT: I'm sorry, I didn't hear the question and I didn't hear the answer. You asked what? You asked what skag—

Q Do you know what skag is, Mr. Harris?

A It's used as drug language.

THE COURT: It's what?

THE WITNESS: It's used as drug language. They use it instead of saying heroine, they say skag.

Q It's the language or the vernacular or the term that's used for heroine, is that right?

A That's right.

Q Mr. Harris, what time were you arrested on the night of the 7th?

A This time, I really does not know.

Q Approximately.

[fol. 446] A 5, 6:00; 6:00, 5:00, I don't know.

Q Where were you taken, Mr. Harris?

A I have it marked on a map.

Q Where were you taken after you were arrested in the City of New Rochelle, where were you taken?

A To—after we was arrested and everything, to your office, we was interrogated.

Q You talked to me, didn't you?

A That's right, you interrogated, you didn't inform us of our rights.

MR. PROJANSKY: Objection, Your Honor, I'm going to object to any introduction at this time of any evidence for any purpose whatsoever of any interrogation which took place in the District Attorney's office, any place else by the District Attorney.

THE COURT: All the question was, Mr. Projansky was did you talk to me and the answer was yes, he did. So this is proper. Now, I will pass on the next question when it comes.

Q Were there other police officers present?

A I couldn't say. You said there was. I couldn't say whether they police officers or what.

Q Do you recall approximately what time it was.

A No, because I was rather—

[fol. 447] Q Do you recall what time?

A No, I do not.

Q Could you estimate whether it was within one hour or two hours after you were arrested?
A I said maybe hour, hour after I was arrested?
Q Pardon?
A Approximately an hour after I was arrested, something like that.
Q And do you recall a man sitting next to you with a machine similar to the one that the court reporter has there?
A I do.
Q And do you recall me asking you certain questions?
A Yes.
Q And you giving me certain answers?
A I do.
Q Do you recall me asking you this question, and you giving me this answer?
MR. FACELLE: Now I'll pause, Your Honor. I'm sure there will be an objection before I even read it.
MR. PROJANSKY: At this time I'd like to render an objection to this entire line of questioning. Mr. Facelle is referring to an interrogation of the defendant while in police custody in January of '66. I think that before Mr. [fol. 448] Facelle makes any reference to any record of such interrogation or anything that was said by the defendant at that time, that he has to lay a foundation and show that it was voluntarily made, under the law, and in conformity with the requirements as set up in the case of Miranda v. Arizona.
THE COURT: Are you going to quote the Kulis Case to me, Mr. Facelle?
MR. FACELLE: A copy of which I have.
THE COURT: In our Court of Appeals.
MR. FACELLE: That's correct, Your Honor, Court of Appeals.
THE COURT: You let Mr. Projansky look at it. I will permit the interrogation Mr. Projansky. If you note the Kulis case, permits it in the Court of Appeals, in this November. I will overrule the objection.
MR. PROJANSKY: Exception, Your Honor.
Q Do you recall me asking you this question and you giving me this answer?

"Question: What did you do Tuesday night with Joe?

Answer: He drove me to get a bag for him and I got it for him."

Q (continuing) Do you recall me asking you that question and you giving me that answer?

A No, I do not.

[fol. 449] Q Do you recall this series of questions and answers:

"Question: All right, in his car?
Answer: In his car.
Question: He wanted a bag of what?
Answer: Skag.
Question: All right, how much?
Answer: A nickel bag."

Q (continuing) Do you recall those questions and those answers?

A I do.

Q Were those questions or the answers that you gave to those questions, withdrawn. Do you recall being asked this question and giving these answers:

"Question: All right, and he drove you someplace?
Answer: He drove me someplace.
Question: Did you tell him where to go?
Answer: No, he knows where to go.
Question: He knows where to go?
Answer: He knows where to go.
Question: You didn't tell him where to go.
Answer: I didn't tell him where to go."

Q (continuing) Do you recall those questions and giving me those answers?

A No, I do not.

[fol. 450] Q Now, those prior questions, when I asked you if you remember the question:

"Question: He wanted a bag of what?
Answer: Skag.
Question: All right, how much?
Answer: A nickel bag."

Q (continuing) You recall those questions and answers?

A I think I do.

Q Were they true when you told them to me, within an hour or so after you were arrested?

A I couldn't say whether they were true or not.

Q You could not say whether they were true or not?

A Because I—, my joints was down and I needed drugs.

MR. FACELLE: If Your Honor please, may we have the witness answer?

THE COURT: No, the witness answered. He said that I can't tell you whether they were true or not. He has answered.

MR. FACELLE: That was the answer.

Q Do you recall being asked this question and giving this answer:

"Question: Did he front the bread? Or did you put it out yourself?

Answer: He had it, he gave me the money."

[fol. 451] A Will you phrase the question, I didn't understand you.

Q Do you recall being asked that question, "Did he front the bread or did you put it out yourself? Answer: He had it, he gave me the money."

A What you mean by front the bread?

Q You don't understand the expression?

A Not front the bread.

Q Do you recall being asked that question and giving the answer, "He had it, he gave me the money."?

A He had what?

THE COURT: All you were asked, Mr. Harris—

THE WITNESS: No, I don't remember the question.

THE COURT: That is the answer, he doesn't know.

THE WITNESS: I don't recall if he asked that question.

Q Do you recall being asked this question and giving these answers:

"Question: All right, how much?

Answer: Five dollars.

Question: How long were you gone?

Answer: About two minutes.
Question: And you gave back with a nickel bag?
Answer: Yes.
Question: Where did you give it to him?"
[fol. 452] "Answer: In his car."

Q (continuing) Do you recall those questions and those answers?
A No, sir, I do not.
Q None of them?
A None of them.
Q Do you recall being asked the question:

"Question: That's all that happened that night?"

MR. FACELLE: And giving the answer:

"Answer: That's all that happened that night.
Question: Now, when is the next time you saw him?
Answer: Last night.
Question: Where?
Answer: Three-Fours."

Q (continuing) Do you recall those series of questions and giving those answers?
A Mr. Facelle, I don't remember giving too many answers.
THE COURT: No, Mr. Harris—
MR. FACELLE: I'll repeat the question.
THE COURT: You are being asked whether you recall these questions being asked of you and you giving these answers.
A No, sir, I don't remember giving the answers.
Q All right. Do you recall this series of questions and [fol. 453] giving these answers:

"Question: Did you talk about skag?
Answer: Uh-huh.
Question: Did he want you to cop for him?
Answer: Yes.
Question: Where did you go, same place?
Answer: Same place. No, out there.

Question: Different place?
Answer: The boy was standing outside the Three-Fours."

Q (continuing) Do you recall those questions and giving those answers?
A No, I do not.
Q Mr. Harris, do you recall being asked this series of questions and giving these answers:

"Question: You went outside?
Answer: I went outside.
Question: And Joe stayed inside?
Answer: Joe stayed inside?
Question: Who was sitting with Joe?
Answer: Eddie.
Question: Anybody else?
Answer: No, Sal was around, Ronnie was around."

Q (continuing) Do you recall those questions and giving those answers?
[fol. 454] A No, sir. I would like to know, who is Sal.
Q I asked you if you recall you giving the answer, "No, Sal was around, Ronnie was around"?
A No, sir.
Q Do you recall that answer?
A No, sir.
Q Do you recall this series of questions and giving these answers:

"Question: What else—or withdrawn.
Question: What did Joe tell you he wanted?
Answer: He said he wanted some skag.
Question: Well, did he tell you, one, two, three half loads, bundle?
Answer: He wanted two."

Q (continuing) Do you recall being asked those questions and giving those answers?
A I do not.
Q Do you recall being asked the following questions and giving the following answers:

"Question: All right, then what happened, you went outside?
Answer: Uh-huh.
Question: And you saw this man?
Answer: Uh-huh."
[fol. 455] "Question: Then you came back?
Answer: Uh-huh.
Question: Did you give him nickel bags?
Answer: Yes."

Q (continuing) Do you recall those questions and giving those answers?
A I do not.
Q Do you recall the following series of questions and giving the following answers?

"Question: How much did he give you?
Answer: He gave me a taste.
Question: How much did he give you?
Answer: I got about a half a bag. He kept a bag and a half himself.
Question: He gave you twelve dollars, didn't he?
Answer: Oh, how much money?
Question: Yes, he gave you twelve bucks plus a taste?
Answer: Yes.
Question: When you say a taste, you mean he gave you part of the bag?
Answer: Yes."

Q (continuing) Do you recall those questions and giving those answers?
[fol. 456] A I do not.
Q All right. Do you recall the following series of questions and giving the following answers:

"Question: Were these three-cent bags or nickel bags?
Answer: Nickel bags.
Question: When we say nickel, we mean five dollar bags, is that right?
Answer: That's right.
Question: Did that happen last night?

Answer: It happened last night.
Question: Do you remember what time?
Answer: No, I don't."

Q (continuing) Do you recall being asked those and giving those answers?
A No, I do not.
Q You do recall that this questioning took place on January 7th, 1966, is that correct?
A If that's the day I was arrested.
Q And Mr. Harris, you don't recall being asked any of those questions or giving any of those answers?
A No, I do not.
Q But you do recall being questioned—
THE COURT: The witness has already said he does.
THE WITNESS: May I make a statement?
[fol. 457] MR. PROJANSKY: Your Honor, at this time I'd like renew my objection and strike to remove that entire line of interrogations on the grounds previously stated, and I'll ask at this time—Your Honor as I anticipate will deny my request—if you will please instruct the jury that prior statements inconsistent with the defendant's testimony on direct examination may be considered by them only as to his credibility and not as to proof of the—herein.
THE COURT: No, I will not. I will not do that. I will charge them as to what they may consider this as, any other evidence in connection with this particular case, bearing upon the weight of the testimony of this witness. But I will deny your renewal of the motion that you made at the outset of this examination, Mr. Projansky, and grant an exception.
MR. PROJANSKY: Yes, Your Honor.
THE COURT: All right.

CROSS EXAMINATION CONTINUING BY MR. FACELLE:

Q Mr. Harris, do you recall being asked the following series of questions and giving the following answers:

"Question: Viven—"

MR. PROJANSKY: Excuse me, Your Honor, may we have the time and date set as to these questions?

[fol. 458] THE COURT: Yes.

Q Do you recall—

THE COURT: Mr. Projansky is asking you, are you back to—

MR. FACELLE: The same reference, Judge.

THE COURT: Mr. Projansky asked you for the date.

MR. FACELLE: All right.

Q Do you recall being questioned by me at my office, at the District Attorney's office on January 7th, 1966, at approximately 7:10 P.M.?

A No, I do not. Mr.—

Q You don't recall talking to me that night?

A I recall talking to you. Mr. Facelle—

Q Wait, just answer my questions please, Mr. Harris.

A I have a slight concussion, I do not remember everything that happened in the past.

MR. FACELLE: Voluntary statement.

THE COURT: The witness says that he does not remember everything that happened in the past.

THE WITNESS: I have a slight concussion; has been in the hospital.

MR. FACELLE: If Your Honor please.

Q Did you have a concussion on the night of January 7th, 1966, Mr. Harris?

[fol. 459] A I was in a car wreck four years ago. I been having four years, I've laid in Grasslands Hospital one month behind it.

MR. FACELLE: If Your Honor please, may we have an answer to a question?

THE COURT: No, I'll allow it. He said that he remembers your interrogation. Don't you remember talking to Mr. Facelle?

THE WITNESS: I remember talking to Mr. Facelle, I said that.

THE COURT: The thing is, you are saying to the ladies and gentlemen of the jury that you do not recall what the questions were or what answers to them you gave?

THE WITNESS: That's right.

THE COURT: All right.

the following questions

s?

Q Do you recall being asked
and giving the following answer dy make any promise to

"Question: Viven, anybo
you?
Answer: Nobody made r
Question: Anybody mak
Answer: Nobody made

no promises.
e any threats to you?
any threats."
stain an objection on that

THE COURT: No, I will sus
basis.
[fol. 460] MR. PROJANSKY:
have a continuing objection?

Your Honor, I assume I
continuing objection. I

THE COURT: You have a Mr. Projansky, that you
realize that, but I'd just prefer, question is asked rather
make the objection at the time jection.
than to consider a continuing ob

Q Do you recall being asked the following two ques-
tions and giving the following tw o answers:

"Question: What you t
Answer: Yes.
Question: And you hav
untarily?
Answer: Yes."

old us was the truth?
e told us freely and vol-

Q (continuing) Do you re call being asked those two
questions and giving those two answers?

A No, I do not.

MR. FACELLE: If Your H onor, please, may we have
this marked as People's Exhibit for identification.

THE COURT: Only.

(Received and marked for identification as People's Exhibit 6.)

MR. FACELLE: I have no further questions, Your Honor.

THE COURT: Ask Mr. Projansky if you and the
[fol. 461] defendant and Mr. Facelle and the stenographer
to come in for a second, please.

(Recess to the Court's Cha mbers at 4:19 P.M.)

(Resuming in the Court's Chambers in the absence of the jury. The defendant and both counsel are present.)

THE COURT: Mr. Facelle, Solely for the purposes of the record, at this particular stage and on behalf of the defendant, is the District Attorney prepared to state for the record whether or not the required warning under the Miranda Case were given to this defendant prior to the taking of the statements?

MR. PROJANSKY: Your Honor—

MR. FACELLE: I submit, Judge, that this is a rather difficult question for me to answer, only because perhaps I am not knowledgable enough or sophisticated to know exactly what the required warnings are. I submit that warnings were given to this defendant which appear in the People's Exhibit for identification, that he was advised.

THE COURT: May I look at them, may I look at the Exhibit?

(People's Exhibit 6 for identification handed to the Court.)

[fol. 462] THE COURT: Other than what appears in the record here, did you give any other warnings other than those which are incorporated in People's Exhibit 6?

MR. FACELLE: No, Sir, I did not.

THE COURT: All right, then it is the Court's opinion at this time that the Exhibit marked for identification indicates that such warnings as are required under the Miranda Case were not given to the defendant.

MR. FACELLE: Well, may I, Judge, I think that the Court—

THE COURT: It appears to the Court.

MR. FACELLE: Well, may I respectfully submit, Judge, that the Court has not read the Exhibit and I think perhaps that—

THE COURT: You sit outside. "The only question I find here is somebody said to him, "You don't have to talk to us. Is there any question in your mind that you don't have to talk to us if you don't want to." And the

answer is, "No." Now, if you will show me any other thing then that statement made in there—

MR. FACELLE: May I then continue, with the Court's permission, and read certain questions bearing on the Miranda requirements.

THE COURT: If they are.

[fol. 463] MR. PROJANSKY: Excuse me, Your Honor, may I be heard herein? I'd like to ask Mr.—I think defense counsel ought to have an opportunity to see this.

THE COURT: You can.

MR. FACELLE: I have no objection to that.

THE COURT: You can.

MR. PROJANSKY: It seems to me, Your Honor, unless Mr. Facelle or some other person in the District Attorney's office at that time and in that place advised the defendant that he was entitled to counsel then and there, and that in the event he couldn't afford counsel, that he would be provided with counsel upon his request and expression of indigency—

THE COURT: You have a lot of support in two dissents in the Kulis Case, Mr. Justice Keating and Mr. Justice Fuld.

MR. FACELLE: May I at least put this, since the Court has referred to it, my question, "That you do not have to talk to us if you don't want to." Next question was, "If you do talk to us, you're going to tell us the truth, is that right?" And the answer was, "Yes." The next question, "And if you talk to us and you tell us the truth, you know it can be used against you? Answer: Uh-huh." "No question about that in your mind is there? Witness shakes his head no."

[fol. 464] THE COURT: All I want the record to reflect—

MR. FACELLE: May I continue, please, Judge? It's a question of counsel, he was asked abount counsel.

THE COURT: No, please. Now all I want to say is that man was in custody at the time that this examination was taken, and the interrogation is an in-custody interrogation.

MR. FACELLE: Judge, may I please, on the question of counsel, the defendant in this case requested counsel.

MR. PROJANSKY: Your Honor, I think that—

MR. FACELLE: May I please continue, Judge? "Question: I want to know exactly what happened? Answer: Yes, but I'd rather see a lawyer before I keep on." This is all before the colloquy which was put on the record before the jury, the defendant said, "I would like to see a lawyer before I keep on." "Question: That is your privilege, that is your right. You want to call one up now? Answer: No. Question: What? Answer: I'll call tomorrow. Question: You'll call him tomorrow? Answer: Yes. Statement by Mr. Facelle: Okay, take him out. Question: I will put on the record you can call a lawyer right now if you want, any question about that in your mind. Answer: [fol. 465] Wait a minute." And I think this section, again, Your Honor, I'll put for the record, that this all preceeds the colloquy which was put on the record.

THE COURT: All I feel—

MR. FACELLE: There's more, Judge, because I established there was a waiver here and if I may continue.

THE COURT: No, don't do that, don't do that. All I feel is that this could be incorporated as colloquy in here, by virtue of the fact that the Kulis Case is decided under Escobedo Principles, not under Miranda Principles, and this is seems to me will have to be resolved at an Appellate level, as I remember the Kulis Case.

MR. FACELLE: Now—

THE COURT: Is that correct, Mr. Projansky?

MR. PROJANSKY: I will assume so, Your Honor.

THE COURT: No, you have it out there. The Kulis Case was decided and Mr. Justice Keating in his dissent said that I feel that the Miranda supercedes this decision, so—

MR. FACELLE: May I please continue, Judge? There's two more sections here which I believe must be placed on the record, since the issue has been raised of Miranda and Kulis. After the defendant had stated that [fol. 466] he wished to see a lawyer and I told him that he could call one and to take him out, he asked, "Okay, what's the question? Go ahead." Will you note down what my question was and then there was question and answering. The last question put to the defendant in this state-

ment, Your Honor, and I would like it on the record, after I said "You were told this freely and voluntarily? Answer: Yes. Statement or question by Mr. Schneider, was it your own decision to talk after you wanted a lawyer? Answer: I don't understand the question. Question: By Mr. Schneider: I said, you decided you wanted and then you said you wanted to shoot, go ahead and ask the question, right? Answer: Yes. That is your own decision? Yes."

THE COURT: Mr. Projansky and I would like to have a copy of that statement delivered to Mr. Projansky, if you will, please.

MR. PROJANSKY: May I review that for just a moment, Your Honor?

MR. FACELLE: That's my only copy, the only copy.

THE COURT: Will you see that he gets a copy?

MR. FACELLE: Yes, Judge.

THE COURT: All right.

MR. PROJANSKY: It's marked for identification.

[fol. 467] MR. FACELLE: That's my copy. The one that is marked for identification is still in Court.

THE COURT: We have the record made and we will see that you get a Xerox copy of the original to Mr. Projansky.

MR. FACELLE: That's correct, Judge.

THE COURT: All right.

MR. PROJANSKY: Will the record show that at this time that this is a cursory examination of this copy of the interrogation that Mr. Facelle has handed to me. Your Honor, I would like to point out to the Court that there was interrogation as to material facts herein prior to any mention of an attorney, that the mention of an attorney first appeared on page 6.

THE COURT: You may be, Mr. Projansky, may be one hundred percent correct.

MR. PROJANSKY: In addition, Your Honor, without referring to the contents of this document, I would like to say, Your Honor, that I take strong objection to the procedure herein and this was presented to the jury before any examination was had, so that legal voluntariness of this statement and—

THE COURT: Let the record reflect, Mr. Projansky, for you, that you are taking an exception to the fact that under the Huntley case, it was not offered on a basis of [fol. 468] notice required under 831 of the Code of Criminal Procedure, that you also have an exception under the fact that it violates the Miranda against Arizona decision, in the United States Supreme Court.

MR. PROJANSKY: And Your Honor, at this time I would like to mave for the withdrawal of a juror.

THE COURT: You have to do that in front of a jury.

MR. PROJANSKY: I'll do that, Your Honor.

THE COURT: In front of the jury and I will instruct the jury that this is the only awkward method by which you have to protect the record with this. I will deny your motion, I think when we get out there.

MR. PROJANSKY: Yes, Your Honor.

(Recessing to the Courtroom at 4:30 p.m. The defendant and both are present.)

THE COURT: Are you through with this witness?

MR. FACELLE: Yes, Your Honor.

MR. PROJANSKY: Your Honor, at this time I'd like to move for a withdrawal of a juror, citing as authority, grounds for my motion herein, the case of Miranda v. Arizona. The People versus Huntley and Section 813c of the Code of Criminal Procedure.

[fol. 469] THE COURT: Yes. I will deny your motion, Mr. Projansky, and grant you an exception. It is an awkward method by which one must follow a procedure, but again, and I caution the jury that there will come a time, that matters of law are those for the Court and counsel, and you must not make any interpretation of my ruling of law, if you will, please. All right. Is there any redirect of this witness.

MR. PROJANSKY: Yes, Your Honor.

The defendant Viven Harris, having been previously duly sworn, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION BY MR. PROJANSKY

Q Viven, you testified earlier on direct examination that there was a panic on in December and January, December of 1965 and January 1966?

A That's right.

Q Now, what does the word panic mean among drug users?

A When drugs are very scarce.

Q Does it mean that there are no drugs whatsoever?

A No, sir. It means that drugs are very scarce.

Q But that one can sometimes purchase drugs even during a panic?

A One can sometimes purchase drugs during a panic.

Q And Henry Stanley, is he a real person known to you?

[fol. 470] MR. FACELLE: Objection, Your Honor.

THE COURT: No, I will allow it.

A Yes.

Q Do you know his whereabouts today?

A Yes, sir.

Q Do you know where he is right now?

A I couldn't say exactly where he is, but I know he—moved to the Bronx, that's all.

MR. PROJANSKY: No further questions, Your Honor.

RECROSS EXAMINATION BY MR. FACELLE:

Q Do you know where in the Bronx he moved to?

A I do not.

Q Do you know how to locate him?

A No.

MR. FACELLE: I have no further questions.

THE COURT: You may step down, Mr. Harris.

THE WITNESS: Thank you.

(The witness was excused.)

* * * *

STATEMENT OF PETITIONER

STATEMENT OF: VIVEN HARRIS, 149 Guion Avenue, New Rochelle, New York, taken Friday, January 7, 1966, at 7:10 p.m., at the office of the District Attorney, Westchester County Courthouse, White Plains, New York, in connection with an investigation into the sale of narcotics, in the presence of Assistant District Attorney Thomas Facelle, Assistant District Attorney Warren Schneider, Assistant District Attorney Thomas Morosco, Criminal Investigator Dan Gallagher, Office of the District Attorney, White Plains, New York, Detective John Brackin, New Rochelle Police Department, New Rochelle, New York, and Stanley C. Post, stenographer, as follows:

[fol. 2] BY MR. FACELLE:

Q What is your name, (spelling) V-i-v-a-n or e-n?
A E-n.
Q What is your last name?
A Harris.
Q Have you ever been known by Viven Hairston?
A No.
Q Where do you live?
A 149 Guion.
Q New Rochelle, right?
A New Rochelle.
Q All right. You know my name is Facelle, and you know I am an Assistant District Attorney, right?
A Yes.
Q And you know these other people in the room are either police officers or Assistant District Attorneys, any questions in your mind about that?
A No.
Q All right. Any question in your mind that you don't have to talk to us if you don't want to?
A No.
Q If you do talk to us, you are going to tell us the [fol. 3] truth, is that right?
A Yes.

Q And if you talk to us and you tell us the truth, you know it can be used against you?
A Uh huh.
Q No question about that in your mind, is there?
A (Witness shakes head no.)
Q Are you going to tell us the truth?
A I'm going to tell you what I know.
Q And what you know, is it going to be the truth?
A Yes.
Q All right.
A From my point of view.
Q All right. Now who picked you up tonight?
A Eddie and Joe.
Q About an hour ago?
A Yes.
Q Where?
A Lincoln Avenue.
Q Did they tell you that they were police officers?
A No.
Q They didn't tell you?
[fol. 4] A (Witness shakes head no.)
Q But you were arrested by police officers, weren't you, from New Rochelle?
A Uh huh.
Q Do you know now that this Eddie and Joe are police officers?
A Uh huh.
Q Did you ever know their last names?
A No.
Q When did you first meet them?
A About a week ago.
Q Where?
A Three Fours.
Q What did you talk about?
A "Skag".
Q When you say "skag", you mean heroin, right?
A Yes.
Q Did you do anything with the men?
A No, not the night I met them.
Q All right. On January 4th, which is only Tuesday of this week, did you meet Eddie and Joe?

A Yes, I saw them.
[fol. 5] Q Who were they with?
A They was in the Three Fours.
Q With who?
A Just a lot of people.
Q No, who was Eddie and Joe with?
A I don't know. I guess they was there by theyself.
Q No, did you have any conversation with them about "skag"
A Yes.
Q All right, and then what happened?
A Nothing.
Q Nothing happened?
A (Witness shakes head no.)
Q Did you go any place with Joe?
A (No answer.)
Q You already told us now.
A It ain't on that thing there (referring to reporter's stenographic machine).
Q I want to know, so there's no misunderstanding, about what you told us, but I don't want you or me saying anything that you didn't say. I want it down exactly the way you told us so there is no misunderstand-
[fol. 6] ing.
A Yes, but I'd rather see a lawyer before I keep on.
Q That's your privilege. That is your right. You want to call one up now?
A No.
Q What?
A No, I'll call tomorrow.
Q You will call him tomorrow?
A Yes.
MR. FACELLE: Okay, take him out.
Q I will put on the record you can call a lawyer right now, if you want. Any question about that in your mind?
A Wait a minute. We will be booked tonight on, I don't know, on what charges, could you tell us that?
Q Sure.
A What?

Q Sale of narcotics.
A Sale of narcotics?
Q Uh huh.
[fol. 7] A Everybody out there selling narcotics?
Q I am talking about you. I am talking about Viven Harris, I am not talking about anybody else. You better let them worry about themselves, and everybody is taking care of themselves, so you worry about Viven Harris.
A Okay. What's the question? Go ahead.
Q You know what my question was.
A No, what is the question?
Q What did you do Tuesday night with Joe?
A He drove me to get a bag for him, and I got it for him.
Q All right, in his car?
A In his car.
Q He wanted a bag of what?
A "Skag".
Q All right, how much?
A A nickel bag.
Q All right. And he drove you some place?
A He drove me some place.
Q Did you tell him where to go?
A No. He knows where to go.
[fol. 8] Q He knows where to go?
A He knows where to go.
Q You didn't tell him where to go?
A I didn't tell him where to go.
Q The two of you got in the car and he just drove there?
A Yes.
Q He parked the car?
A Uh huh.
Q Did you drive or did he drive?
A He drove.
Q All right, he drove and he parked the car, and then you got out?
A Uh huh.
Q And you went inside?
A Uh huh.

Q Right?
A (Witness shakes head yes.)
Q Did he front the bread, or did you put it out yourself?
A He had it. He gave me the money.
Q All right, how much?
[fol. 9] A Five dollars.
Q How long were you gone?
A About two minutes.
Q And you came back with a nickel bag?
A Yes.
Q Where did you give it to him?
A In his car.
Q And then what did you do?
A He drove me home. I got out.
Q He drove you home to Guion Avenue?
A Uh huh.
Q That's all that happened that night?
A That's all that happened that night.
Q Now when is the next time you saw him?
A Last night.
Q Where?
A Three Fours.
Q Did you talk about "skag"?
A Uh huh.
Q Did he want you to "cop" for him?
A Yes.
Q Where did you go, same place?
[fol. 10] A Same place. No, out there.
Q Different place?
A No, the boy was standing outside the Three Fours.
Q You went outside?
A I went outside.
Q And Joe stayed inside?
A Joe stayed inside.
Q Who was sitting with Joe?
A Eddie.
Q Anybody else?
A No. Sal was around, Ronnie was around.
Q What did Joe tell you he wanted?
A He said he wanted some "skag".

Q Well, did he tell you one, two, three, half a load, bundle?
A He wanted two.
Q All right, then what happened? You went outside?
A Uh huh.
Q And you saw this man?
A Uh huh.
Q Then you came back?
A Uh huh.
[fol. 11] Q Did you give him two nickel bags?
A Yes.
Q How much did he give you?
A He gave me a taste.
Q How much did he give you?
A I got about a half a bag. He kept a bag and a half himself.
Q He gave you twelve dollars, didn't he?
A Oh, how much money?
A Yes. He gave you twelve bucks plus a taste?
A Yes.
Q When you say "a taste", you mean he gave you part of a bag?
A Yes.
Q Were these three cent bags or nickel bags?
A Nickel bags.
Q And when we say "nickel", we mean five-dollar bags, is that right?
A That's right.
Q Did that happen last night?
A It happened last night.
Q Do you remember what time?
[fol. 12] A No, I don't.
Q Did you do anything else with him?
A No.
Q Has he ever been up in your "pad"?
A No.
Q Viven, anybody made any promises to you?
A Nobody made no promises.
Q Anybody make any threats to you?
A Nobody made no threats here.
Q Anybody use any force on you?

A No.
Q Anybody lay a hand on you?
A No.
Q What you told us was the truth?
A Yes.
Q And you have told us freely and voluntarily?
A Yes.

MR. SCHNEIDER: Was it your own decision to talk after you wanted a lawyer?

A I don't understand your question.

MR. SCHNEIDER: I said you decided you wanted a lawyer, and then you said you wanted to shoot, go ahead and ask the questions, right?

[fol. 13] A Yes.

MR. SCHNEIDER: That is your own decision?

Q All right?
A Yes.

MR. FACELLE: All right, Stan.

(Whereupon the statement was concluded at 7:19 p.m.)

P's Ex. No. 6 for iden.
12/12/66 BF
People's Ex. 6

• • • •

[fol. 542] THE COURT: M
Gentlemen of the Jury:

We have reached the point
which I am sure you well rec
the evidence, heard the sum
People and for the Defendant,
enter upon your deliberations
It may well be for me to at
with you, to read to you a sec
nal Procedure, that you will u
we talk to you about the La
case, I am talking about decla
acted in the statutes by the Le
have been handed down by our
as they apply in your consider
stitutional provisions that are
a criminal case.

The statute provides that in
must state to them all matte
necessary for their informati
and must, if requested, in add
[fol. 543] its duty to say, infers of law which it thinks
the exclusive judges of all qion in giving their verdict,
phasize for you now, in the dition to what it may deem
function of a jury to pass uform the jury that they are
that are presented to you foruestions of fact. So I em-
ing to talk to you about that trial of a lawsuit it is the
must state to them that in upon the quuestions of fact
guilt, they must not consider r your resolution. I am go-
what we are about to emba a little later on. The Court
the Law, as a matter for you determining the question of
nation of the evidence that punishment. So this is about
ticular case. rk upon, is a discussion of

It almost seems unnecessa to utilize in your determi-
for me to say this, but judici you have heard in this par-
to, to say to you that we al
is a sacrifice on your part t ary, Ladies and Gentlemen,
busy people, you have other c ially I think I am compeled
fulfillment of this obligation ready all recognize that this
perior public service and, I s to be here, that you are all
that, so that you will be fla ommitments, and that in the
n you are rendering a su-
uppose even in implementing
ttered by what I have said,

r. Foreman and Ladies and

in the trial of this case
ognize, having heard all of
mation of counsel for the
that you are now about to
on the questions of fact.
the outset, in discussing it
ction of the Code of Crimi-
understand first, that when
w that applies to a given
arations that have been en-
egislature, by decisions that
r highest Courts, and as far
ration of the evidence, con-
accorded to defendants in

charging a jury, the Court

[fol. 544] I may say to you that George Washington is the Father of the expression that you see cut on the courthouse in New York County, that says that the Administration of Justice is the Firmest Pillar of Good Government, and you as a jury, about to undertake the responsibilities that are imposed upon you by your oath, are performing that great public function.

It may well be, Ladies and Gentlemen, when I talk about the Law that you may differ with it. You may not agree with the statements; these may strike you as contrary to what you might feel the Law should be. But remember that it is your responsibility to accept it as it is submitted to you and it should not be your concept of what the Law ought to be under a given circumstance that should control. This is part of your oath. Let me at this particular point point this out to you. You won't determine this, Ladies and Gentlemen, on what you think the evidence ought to be. You won't pass upon this if you fulfill your obligation as to what you think the proof ought to be in a given case. All you have, as the com-[fol. 545] modity that you will utilize in determining the case, is determining what the evidence is before you at this particular time, and this likewise goes to the propositions of Law that become necessary for you to have in resolving them, not what one will consider Law to be, but what it is insofar as the instant case is concerned.

Ultimately, you realize that you are going to determine the guilt or innocence of this defendant who is on trial here today by virtue of an indictment which has been handed down by the Grand Jury of the County of Westchester. As has been stated to you more informally, it becomes my obligation to say to you that an indictment is not proof of guilt. It is an accusation which has been handed down by the Grand Jury, and that under our system of jurisprudence, the way we live in this particular country, as far as the Law is concerned, this is the instrumentality by which this case gets into Court. It is a written charge against the defendant. It is not proof of his guilt. Therefore, I utilize the accepted expression

that an indictment has no provative value of his guilt of [fol. 546] the defendant.

May I at this moment, suggest to you or say to you, that all indictments are brought in the name of the People of the State of New York. This should not cause any constirnation and confusion on your part as to why it is brought. It is the way the Legislature, that the body politic in our Society is known, as the People of the State of New York, and therefore the vehicle, to wit, the indictment that brings this charge into this Court is brought in the name of the People of the State of New York. So may I for a moment point out to you what may seem apparent, but this makes a line of demarcation in the trial.

The District Attorney's Office is here representing the People of the State of New York. It is their responsibility under the law, in the fulfillment of their public duty, to submit to you, through evidence, such evidence as is available, if in fact it is available in support of the indictment.

The defendant appears here through able counsel, Mr. Projansky. It becomes the responsibility of the attorney for the defendant to utilize, on the defendant, all of his [fol. 547] skills and talents to the utmost in the defense of his client. This is his responsibility just as it is Mr. Facelle's responsibility.

Then there is to the Court accorded the responsibility of the Law and the conduct of trial. Then the component part is the jury which passes upon the facts.

I did say to you before, and I again repeat it to you, statement of counsel at any stage in the course of the trial is not evidence. You do realize that. The same way the summation of counsel is not evidence. I do not mean to convey to you that one should utterly ignore it, because it may, in the presentation of the arguments, it may be certain arguments that would commend themselves to you in your review of the facts, and you arrive at a sense of reason in your minds. But, the most important thing for me is to be certain that you understand that the statements of counsel never become evidence nor are they to be considered evidence in your deliberations.

This then brings me to what I had previously said, and

[fol. 548] I must re-emphasize it so that I eliminate this from your deliberations. Rulings of Law by the Court are not for the jury to consider. The sustaining or rejecting of motions, the sustaining or rejection of rulings of evidence are not matters for a jury to be concerned with. These are the responsibility of the Court in the progress of a trial, to channel to you, Ladies and Gentlemen such essential factual ingredients as would enable you to adequautely and reasonably pass upon the evidence. But you must not, and this would be detrimental to the defendant, most assuredly, detrimental to the People, seek to draw any interpretation from rulings that have been made by the Court from time to time in the course of this trial. If I had an opinion, Ladies and Gentlemen, the Law imposes upon me the duty that I must not permit this opinion to be in any way conveyed to you, and I reject the thought that in any possible way that you could interpret that any of these rulings or anything that may have been said in the course of the trial by me, as having any bearing in your deliberations and your function.

[fol. 549] In the trial of a lawsuit, and the charge that is necessary to try and break it into some general areas so you can follow me, there are general principles of law that apply to every criminal case. Then there are specific principles of law that relate to the charge which is brought here in this particular Court as against this defendant; and then there are specific provisions of law which relate to the general areas, fact, evidence, testimony. So permit me to start off with general principles of law and talk to you for a moment about the presumption of innocence.

Under our system of law, the Anglo-saxon, we have what is commonly called an accusatorial system, as contrasted with that section of the world that has what is called an inquisitory section. Inquisitory, the defendant is guilty when he is brought in and he has to fight his way out of that. Under our Anglo-saxon system of law, there is an accusation. I refer to the indictment, brought as against the defendant, that he is cloaked at the time that he comes into this Court, with a presumption of

innocence. By the way, this is not proof of innocence. [fol. 550] He is presumed to be innocent from the time the charge is brought, time of his arraignment, if in fact that occurred, he is presumed to be innocent as one goes to the trial, and he is presumed to be innocent when you go into your jury room, until under our system of accusatorial law, the People have met a responsibility imposed upon them and that is to satisfy you of the guilt of the defendant beyond a reasonable doubt. Then at that point you can visualize it, the presumption of innocence dissolves. If you are satisfied in your review of the evidence that the People have met the burden of proof of the guilt of this defendant beyond a reasonable doubt, the presumption of innocence disappears. So it is that continuing condition that protects a defendant until the People, if in fact they do, meet the responsibility that the statute places upon them. So when we talk about the subject of burden of proof, beyond a reasonable doubt, you will keep this in your mind. I am going to come to it a little later because it really isn't very complicated, though it sounds in this respect.

[fol. 551] What is it that the Grand Jury charged this defendant with? The Grand Jury of the County of Westchester charged this defendant Viven Harris, of the crime of feloniously selling a narcotic drug, violation of Section 3305 of the Public Health Law, and Section 1751 Subdivision 1 of the Penal Law, which was committed as follows: The defendant in the City of New Rochelle, County of Westchester, State of New York, on or about the 4th day of January, 1966, unlawfully bartered and exchanged with and sold, gave and offered to give to another a quantity of a narcotic drug, to wit, a quantity of heroin. Solely again in the line of delineating the areas, that is known as the first count in this indictment.

Then there is a second count which is really the second charge against the defendant. The second count is stated that the Grand Jury aforesaid, by this indictment, further accuses the defendant of the crime of feloniously selling a narcotic drug in violation of Section 3305 of

the Public Health Law, and Section 1751 Subdivision 1 [fol. 552] of the Penal Law, committed as follows:

The said defendant in the City of New Rochelle, County of Westchester, and State of New York, on or about the 6th day of January, 1966, unlawfully bartered and exchanged with and sold, gave and offered to give to another a quantity of a narcotic drug, to wit, a quantity of heroin. All of the acts and transactions alleged in each of the several counts of this indictment are connected together and constitute parts of a common scheme and plan, and all are contrary to the form of the statute in such case made and provided, as against the peace and dignity of the People of the State of New York.

Lest in reading this indictment you may wonder what it means to talk about Section 3305 PHL. If you will recall when I started off, I mentioned to you that acts of Legislation delineate and define what are crimes against the peace and dignity of the State of New York. Section 3305 PHL provides, it shall be unlawful for any person who manufactures, possess, have under his control, sell, prescribe, administer, dispense or compounds any nar- [fol. 553] cotic drug, except as authorized in this article. And you can eliminate from your mind any claim of authorization in this particular case.

It goes a little further, too, Ladies and Gentlemen, the Section 3305 of PHL when it has described a general area prohibiting the sale of or barter or giving of a narcotic drug, because it defines what a sale is. So the Legislature says that when we have utilized in the context of the section that I just read to you under the PHL, the term sale means this. Barter, exchange, or give or offer to sell, barter, exchange or give therefor, and each such transaction made by any person, whether as a principal, proprietor, agent, servant and employee. So may I respectfully call your attention to this fact, that the giving unlawfully and with an intent to give, of a narcotic drug, could be construed under the statute as a sale, if you had listened to what the statute says a sale would constitute. I want to point out to you that this doesn't follow our common everyday concept of a sale where we think of a sale as a transaction of buying and selling; [fol. 554] you can barter it, you can exchange it, give it,

or offer to give it, or offer to exchange or offer to barter. And each such transaction made by any person, whether that person be a principal, agent, servant or a proprietor. That is what Section 3305 of PHL says. Then that's keyed back and I want to explain this so that it would not in any way create any confusion in your mind, when the two references come up, the declaration under the PHL that makes it unlawful to sell the narcotic, then is tied into the Penal Law. The Penal Law, Section 1751, which I just read to you, Subdivision 1 of the Penal Law, says that any person who shall barter or exchange with or sell, give or offer to give to another any narcotic drug, in violation of Article 33 of such law of 3301 of the Public Health Law, and I just read that to you, that definition of sale, came from 3301 of the Public Health Law, shall be punishable, so bear in mind the dual reference to the declaration of the Public Health Law which says it is unlawful, becomes criminal by virtue of the provisions of the Penal Law, under section 1751, and this is why it is here for you.

[fol. 555] The defendant, to the indictment, pleads not guilty. What does this mean? This means that the defendant puts in issue all of the material facts alleged in the indictment, including the fact that there was a quantity of heroin sold on these given days. So when I said to you a little while ago, and again I shall repeat it, that the burden of proof is on the People and it never leaves the People. It is the duty of the People to satisfy you beyond a reasonable doubt that, he, the defendant, Viven Harris, on the 4th day of January, 1966, sold a quantity of a narcotic drug, to wit, heroin. And in the second count, it becomes the duty and responsibility of the People under the Law, Public Health Law, the Penal Law, to satisfy you beyond a reasonable doubt that he, the defendant Viven Harris, on the 6th day of January, 1966, sold, bartered, exchanged within the definition that I gave you, a quantity of heroin, in violation of the statute.

What is it the People offered in proof? In reviewing this, Ladies and Gentlemen with you, I am sure I just dropped into a realm of repetition when I say to you this

[fol. 556] is your function to find these facts, if they in fact have been established, and it is your function to give such weight and credibility, if in fact there is weight and credibility to give to this testimony. So in relating or briefly reviewing the notes that I have here, that are offered in support of this indictment and which are controverted by the defendant, you understand that I do not say that these are established as conclusive evidence in any sense of the word. This is your function and I may not intrude into that area, and if your recollection as to the facts should be different, it is your recollection completely, and I simply do this to try and place the area of proof into an orderliness and refresh your recollection, if in fact it needs any refreshing, because though we have spent lots of time, the facts are not really extensive.

The People called Detective Bermudez. You will recall that he indicated that he had been with the New York City Police Department for a period of 11½ years; that he worked in the Narcotic Bureau of the New York City Police Department for 10 years; that he was a First-[fol 557] grade detective and 32 years of age; that among his duties as a member of the New York City Police Department were in an undercover capacity, or to infiltrate narcotics activity, procure information and to make purchases of narcotics when and if possible. You will recall that he described to you the training, he described to you the area of his activities in this capacity, both on behalf of the Police Department in the City of New York, that he spoke Spanish fluently, that he was able to write it, that he had participated in various police schools. And why all of this? I am going to come to this statement later on and I will repeat it now, because these are items that you may want to consider in determining credibility of the witnesses, as to how much one would accept and how much weight to give to testimony that people gave.

He said that he had made numerous purchases of narcotics over his period of time, 900 to 1000, and that he knew Inspector Carey or Commissioner Carey of the New York City Police Department, and in fact, when Commissioner Carey had been with the New York City Police

[fol. 558] Department, before going to the City of New Rochelle, he had worked under him; that he was asked by Inspector or Commissioner Carey to come to New Rochelle to assist in an investigation, an undercover investigation into the realm and activities of narcotics, and that he went to New Rochelle with his associate or buddy, as he used the term, on December 6, 1965; that an alias utilized by him when he went to New Rochelle was Joe Vargus or Joseph Vargus, and that Eddie Que, who later testified before you as Detective Parks, was his companion in this investigation; that he met the defendant and identified the defendant in this Courtroom as having met him on January 4, 1966, and that he had a conversation in the Three-Fours Bar and Grill at about 6:30 on the evening of January 4, 1966. There was conversation about the guitar, an electronic guitar, and there was a discussion about a price of $35.00 for the guitar, and that ultimately he saw the guitar and that the guitar was purchased; that there was some conversation with Mr. Harris, the defendant, who said that he [fol. 559] had to go to a laundromat, and that then he also said he had to go downtown to score a half a load, and I am sure that by now, after your being here, it becomes unnecessary for me to review what this means in the narcotics trade as vernicular, but represented a purchase of a quantity of narcotics; and that this took place about 5:30 or 5:35 on the evening of January 4, 1966. And that around 7:10 that night, he went around to the laundromat, that Mr. Harris wasn't there, and that about 8:10 that night he again saw Mr. Harris, and there was talk again about the guitar and he drove to Guion Place, talked to Harris; Harris said or told him he would take half a load. Then that the defendant said to him I have just started action again, I'll speak to Al Payne; then they went to 149 Guion Place, that he, the officer said he was driving a Buick Skylark with New Jersey plates, parked the car and went upstairs and met the wife of the defendant and the transaction took place regarding the purchase of the guitar and a price of $25.00 was agreed upon and he gave the defendant $30.00. Then put the

[fol. 560] guitar in the trunk and went outside of the poolroom, and then there was a discussion about $35.00 for a half a load and the conversation with the defendant involved $30.00, and then something was said about, "let's forget about it," and there was a purchase made of 1 bag that evening; and that the defendant wanted $7.00 for that bag, there was an argument about $5.00, and that that was the $5.00 that was left over from the transaction from the guitar. And he gave, according to Detective Bermudez, he gave Detective Bermudez this one packet. In reply, by the way, to a question that the detective answered, that you always haggle over price, that there was always bargaining, that if you gave in too fast, this was one of the mechanisms by which someone spotted one experienced in the narcotics area.

He said that he took that packet over to the car, signed and sealed it, put a gum tape, wrote on it, wrote his shield number on it, place, time and amount and this was all standard procedure, and you do recall, Ladies and Gentlemen, that there was introduced in evidence here [fol. 561] before you what he, Officer Bermudez, as testified, to first as the envelope with the markings there on it, that you have seen, and then the contents which had the small rectangular piece of tape, and you will recall that there was an additional long piece of tape that appeared and that was identified by the chemist from the police department, and a tape having been placed upon there but Detective Bermudez says that that exhibit contained the heroin that he purchased from this defendant on January 4, 1966.

He says, again, on January 6, 1966, about 8:20 or 8:25 there was a meeting inside the Three-Fours Bar in New Rochelle, that the defendant came in, he asked, "what's happening. Nothing, everything is quiet." That the defendant told him that the price was $7.00; that he, Bermudez, said I'll go $6.00, and he came back to the bar about 8:40, and he got into a car across the street and while in the automobile that was parked across the street in New Rochelle, he handed me two decks of heroin and I paid him $12.00. Then there was the conversation you

[fol. 562] will recall, that has been discussed in front of you or that Detective Bermudez says took place in the car, about the selling of junk in New Rochelle and Yonkers and Connecticut, and there was a discussion with him about asking Detective Bermudez to go to business with them in the State of New Jersey. There was a discussion that he was paying, he, the defendant was paying $30.00 for a half a deck in Yonkers, and then he got into the car, Detective Bermudez says, with the Detective Parks and then you have exhibit #3 and #4 which constitutes the brown envelope, and the contents containing the two glassine packets, that are alleged to have been in that brown envelope from the time that they left New Rochelle to the police laboratory and in New York City for testing.

There was, on cross-examination, he was asked, as to the methods in which he, while doing undercover work, was he indulgent in, and he said he posed as a snorter, which is a person who takes heroin through the nose, a knock-around guy, stick-up guy, guy that's on the lam, a [fol. 563] stick-up guy, and he said I gave different stories to different people, that he was reimbursed for his out-of-pocket expenses from the City of New Rochelle Police Department; that in the year 1966 that he had made only two purchases of narcotics as far as his own office was concerned in New York City. He said that it was dangerous work, that he was engaged in a general investigation, that they did not employ an informer and he said that I again, on cross-examination, told them, and because, Ladies and Gentlemen, you realize that replies of witnesses fall into the two brackets: they fall into the bracket of direct testimony and the answers which may be elicited from a witness, on cross-examination becomes germane. Let me just pause here for a moment and say that when you review the evidence, you review it in its entirety. So when I just cover a few of the points, you may have different recollections in reference to this, or I may not be as extensive as your recollection is. I am just simply placing before you that evidence, the testimony of [fol. 564] witnesses and exhibits, and the testimony or answers given on direct and cross-examination.

He said that I told him that I was stick-up man, that I did serve time in jail, and that his job was to obtain the source of supply and to go after the pusher, that he had made purchases from drug addicts who were pushers and he said I'll buy drugs from anyone who will sell it, and he said you have to be very cautious in your dealings with these people because narcotic persons are extremely suspicious. He said that he had never used narcotic drugs, but that he had posed as a narcotic user and he said that he was not called upon to prove himself as a narcotic user, but that if, of necessity, he was called upon, he told you that he would snort what I think he used the term to be, a dummy bag. He said that he told them different stories, that he had in his time purchased different quantities of narcotics and all kinds of narcotics, and that in heroin, the smallest is a taste and they come in kilos, bags, keys, and that they had the three-[fol. 565] cent or tray bag and the five bag and the ten-cent bag; that panic meant there was no junk on the street, there was a shortage of drugs on the market, and that bargaining for the purchase of narcotics, in the manner that he described to you, depended upon with whom you were doing business. He said that the job of the investigation that he was engaged in was to weed out the pushers, and that all of the data which involved his investigation was written down by him in notes or that believed that he had written them down; that on January 6, 1966, there were some discussions about half-loads. He did not offer to sell it to me, referring to the defendant, the half-load, Viven Harris, I made an offer to sell to him and he then made the offer to go into business; that the defendant told him that he, the defendant, had been in action, and this I again impose upon you to simply say this means that he was in the business of selling narcotics, that he had stopped for a while, and that he was back in action again. He was asked whether or not he was able to identify heroin, and he said he was un-[fol. 566] able to identify heroin; that he never saw the defendant Harris use drugs and that his present assignment in New York City Police Department was that to work on major violators in New York City.

I say in reviewing Detective Bermudez' testimony, I have not vouchsafed for his answers either on direct or cross-examination, and I am simply, as I said to you, going over notes which I read during the course of the trial, but these do not intrude into your province at all.

The second witness the People called was Frank Schurr. You will recall his testimony of having gone, I think it was to the City College of New York, and that he had a Bachelor of Science and he had been with the Police Department in the City of New York, and that for approximately 16 years his work had been essentially narcotic analysis and that he had, over the last five years, tested thousands of them.

He identified exhibits #1 and #2 and #3 and #4, if you will recall, and if you accept what he says, of course, [fol. 567] from numbers and letters on the brown envelope and from the tape inside, he identified these exhibits as having been exhibits which came to him and he described to you the manner in which these exhibits were opened, the condition that they were in at the time that he received them, and what he did with them and what tests that he made in connection with them, because, of course, I said to you before, it becomes incumbent upon the People to prove every essential element in this case, and one of the elements is to establish that portion of the indictment that there was heroin sold. So it becomes important for you to determine whether his testimony is entitled to credibility and as to what weight, and you take into consideration his background, his appearance, as you will, and I will go over it later as to all of the tests and whether what he was telling you is accurate, reliable, truthful, and as to whether you accept his statement that what was in these envelopes here were, in his opinion, as a chemist for the New York City Police Department, heroin. He said he did not know Detective [fol. 568] Bermudez. He said he made the test of one group, that was number 122, that was on January 7, 1966; and on the one that was numbered 138 he made on January 10, 1966. He said he did not receive these items from Detective Bermudez but that they were delivered to the police laboratory in New York City, so it is for you

to say, in reviewing these exhibits, whether you are satisfied that these exhibits were in the condition that Detective Bermudez so testified; and the chain that delivered them to the police laboratory, it's a chain of possession, that's what is, and this is being offered to you as proof of these circumstances, and as to whether the packages that he, Mr. Schurr had in New York City were the packages that were delivered in New Rochelle, and were they the packages that Detective Bermudez says were turned over to him or purchased by Detective Bermudez from the defendant in this particular case. He said that you don't test heroin for quantity, you test it for the quality of the heroin, and that the test doesn't show the amount of the quantity and that you remember that he said [fol. 569] necessarily that one-tenth of one percent of a grain would be needed for a test; and that they utilized four tests. You will recall that. But these were sequence tests and one ended up in a microscopic examination, and that he says based upon his experience and based upon the examination he made and the test that he applies and as a chemist, that the contents of the three glassine envelopes that are here and present in Court as exhibits, contain heroin, and that heroin is a narcotic drug. But it is for you to determine whether this is credible and acceptable and believable testimony under the circumstances.

Detective Parks was called by the People. He said he had been a police officer for about 4 years, and it was he who stated that there are approximately 12 or 14 men in the City of New York out of a squad of 25,000 men who are in the undercover area of the Narcotics Bureau; and that he was 26 years of age, married and with 3 children; that he was assigned to New Rochelle to perform a nar- [fol. 570] cotics investigation at the time that he was a patrolman, and their job was to go into the neighborhood of narcotic users and to search out pushers, is possible; that he had made approximately 200 or 250 buys, and that he operated the City of New Rochelle under the name of Eddie Que; and you will recall, Ladies and Gentlemen, there was some testimony that both of these gentlemen testifying for the People said they lived in New

Rochelle in some apartment up over a bar at the time. He said that he met Viven Harris in New Rochelle and the first time he met him was in the Three-Fours Club on January 4 at about 6:30. There was some talk about a guitar and that he, Parks, was to go to the house and look at the guitar and that he went to the house; and that Joe Vargas was the name that was used by Detective Bermudez. He He said that on January 4th he saw Viven Harris in the company with his partner Bermudez. He said he heard no discussions about narcotics, and he overheard the defendant ask Bermudez about the guitar and that he had to go downtown and cop a half a load. [fol. 571] He said that he saw the defendant later in the evening, at the Three-Fours Bar, that the defendant and his partner left, they were gone about 25 minutes and they then returned.

He said that on January 6, 1966, he was with Bermudez and I saw Bermudez go into the bar. Then he saw Bermudez enter the car and he saw the defendant Viven Harris get into the automobile of the detective; saw them move toward each other, and then he, Bermudez came back to the bar after he, Parks, had gone into this bar; said he never saw the alleged sale take place but he said that he saw the gum taping that was part of the exhibit that he had marked on the exhibit his shield number. He admitted on cross-examination or stated on cross-examination that his recollection had been helped to be refreshed by notes that had been taken by his partner or also questions that had been asked of him by Mr. Facelle; and he said that he, again on cross-examination, that the car of Bermudez was parked across the street from the Three-Fours Club on the opposite side of the [fol. 572] street. He said that he was not in New Rochelle every day, that he lived there part of the time and he lived above the 400 Bar and Grill. That was the testimony. The window in the car was open, that night, and he said that the notes which were made by Detective Bermudez were made within an hour after the purchases. He said he posed in New Rochelle as a hoodlum and as a stick-up man from New York City, narcotics user, and he said that he had snorted a dummy bag one time in the

men's room in the Three-Fours Club; said that he had never solicited anyone to purchase narcotics in New Rochelle and said that he never utilized narcotics.

On that, the People have said that we have met the burden of proof. The People say that this testimony that we have offered, and if you bear in mind it has been said to you that the defendant does not have to take the witness stand, the People say that when you review all of this testimony, you put in its proper context, we have established to you beyond a reasonable doubt at this [fol. 573] stage the burden of proof the guilt of the defendant.

The defendant comes forward and takes the stand and denies ever making any statements. The defendant says that he did meet Detective Bermudez on the night of January 4, 1966, that there was no discussion about a guitar, and that there was no sale of any narcotics by him to Detective Bermudez on that particular evening. He says that on January 6, 1966, he saw Bermudez, that he knew him as Joe Vargus, and that he was there with a friend of his, and they were in the club and they decided to, because of Bermudez' insistence in purchasing the narcotics from him, that they would go around to this fellow Stanley's house and they concocted something that consisted of baking powder, put it in glassine envelopes and they came on back to the place and before they would give him the glassine envelopes and take his money, they insisted that he buy a beer, and that he the defendant did not turn over to Detective Bermudez, that if anything in fact were turned over to Detective Bermudez, was turned over by Henry Stanley, his friend, and that, [fol. 574] he, Stanley, made the sale; that he, the defendant, had no part of this transaction under any circumstances and he never saw a sale take place.

It is useless, Ladies and Gentlemen, to go over certain things that I am quite sure that you will well recall, except to now say this, that the police record for conviction of this defendant of prior convictions is not proof, and I think I told you this, is not proof of guilt of this crime and that must be perfectly apparent to you, that the fact that the man had previously been convicted of

a crime is not proof of the guilt of the defendant for which he is charged; but it is an item that you may take into consideration in determining the believability and credibility of a witness. It is an item that you may take into consideration as to how much weight one would give to a witness under these circumstances, and when you take them, again, into the context of all of the circumstances.

I must at this particular time caution you, too, that sympathy would have no place in a trial of a lawsuit. [fol. 575] All of us are sympathetic and this is not going to be a determinative factor in the judgement that you are about to fulfill in the trial of this lawsuit. I may also say to you, in the course of the interrogation as to the statements purportedly given by the defendant to Mr. Facelle, which Mr. Facelle examined him about, these again, these were alleged to have been taken in January 8, 1966, and it was elicited in cross-examination that the defendant's recollection of having given these answers and having been asked these questions, he did not recall them as they were asked of him by Mr. Facelle. These questions and answers go to the weight and the credibility that you give to a witness' testimony. You may take this into consideration as to whether or not he, the defendant, or any person, had made a prior inconsistent statement, you may take that into consideration into determining how much weight you attach to a witness' testimony. How believable it becomes to you under all of the circumstances; but I caution you again that this is not proof of the defendant's guilt. This goes to the weight, believability of a witness' testimony.

[fol. 576] You will recall that the defendant denied under any circumstances having been in the business of pusher. He denied having ever stated that he was in the business in Connecticut and Yonkers and New Rochelle, and he denied that he had ever sold any drugs to the detective; and that he admitted that he was a drug addict; that he himself had used drugs, but he said I have not and I do not sell them. He accordingly denies these. He said that he had been importuned by the detective to seek drugs for him, but that he had told the detective that

there was a panic on, and that it was impossible for him to do anything about it.

Ladies and Gentlemen, if you were to find, and this is within the realm, and I am going to come to that in a moment, if you were to find that this defendant was the agent for Detective Bermudez in the purchasing of drugs, you realize that he would not be liable for this crime. You realize that one who acts as an agent for a prncipial and not be liable, but you would first have to find that he [fol. 577] was an agent and you may take into consideration, if you will on this particular point, the fact that the defendant says I never made any purchases, I was asked to make a purchase for him, I was never able to, under these circumstances. But I point this out to you that if a person is a agent, charged with the commission of a crime, he could not be convicted under those circumstances.

I have bounced over these facts and I am sure they will receive your very careful consideration.

What is it that we mean by the duty of the People to sustain the burden of proof beyond a reasonable doubt? Of course, you do know, this has been stated to you before. It can't be a fancy on your part, it can't be just a whimsical speculation, it can't be some idea that a person has, it doesn't mean beyond all certainty, because in life is beyond all certainty. And I am sure you well know that. It can't be a mechanism, by the way, Ladies and Gentlemen, that you can escape doing what may seem to be an unpleasant duty, and it doesn't mean a doubt in this sense of the word. It means that it must be a rea- [fol. 578] sonable doubt on the evidence as to a material fact. Let me take this back into context for you for a moment. It relates solely to the evidence, because you are going to pass upon evidence in this case, and it must be of doubt on a material fact that you could find in this evidence. There is a difference between my having a reasonable doubt on a thing and a reasonable doubt upon the evidence; so it must be a reasonable doubt founded upon the evidence in this case. Have the People failed in some area to satisfy you beyond a reasonable doubt that they have produced adequate, satisfactory evidence to sustain

their position? That is a rhetorical question, not a demand, Ladies and Gentlemen, at all, on my part, and it must be as to a material fact, and that material fact must play some part in the commission of the crime. For example, it would become immaterial as to whether it happened at 5:36½ or 5:35, if in fact it happened; or if in fact in the sequence of time certain things occurred. This is what I mean. And the material facts in this case that the People are duty-bound from the Law to [fol. 579] establish, are that: was there a narcotics sold? Was it sold at this time and place? Was it sold to Detective Bermudez? Do you believe him? These are the material facts. Was that substance that was sold, given or bartered, heroin? So a reasonable doubt, Ladies and Gentlemen, doesn't mean any doubt. It means a doubt, a reasonable doubt founded upon a evidence in a case as to a material fact.

What is the mental operation by which you visualize this? If after you look over and you review it in your jury room, as each individual, all the evidence, you find that you entertain a reasonable doubt, that the People have failed to establish their case, then Ladies and Gentlemen, your duty is to acquit this defendant. Send him home. It is a doubt that a person of reasonable intelligence can give some good reason for entertaining the doubt, if he is called upon to give a reason. Can you say to yourselves, I have a reasonable doubt, there is a flaw in here in this proof, size of it is immaterial. I have a reasonable doubt. Then the People have failed [fol. 580] to satisfy you beyond a reasonable doubt of the guilt of this defendant. You may take into consideration, too, the fact that I have isolated this as far as the People. You of course will consider, as I have said to you before, all of the evidence in this particular case.

Please note, too, if you will, the use of the word reasonable. We all know there are sceptics; they believe nothing. We all know there are credulous people who believe everything. The world is made up of this. What the Law operates in is a standard of a reasonable person and this is why in a jury of 12 people you seek to get a consensus. This doesn't mean that you must adopt your

neighbor's standard. But it means that in your deliberations in the jury room, you must not go into that jury room with a pre-conceived idea of the guilt of this defendant, or his innocence. You must be prepared to listen to arguments and discussions of your neighbors. This doesn't mean that you must change, but that as reasonable people, we entertain the views of other people. That [fol. 581] doesn't mean that we change, does it? That simply means that we are willing, in the performance of arriving at a fair and just conclusion, to give credence and respect to the citizens, the other people, on your talking of a reasonable area of doubt.

I said to you before, what is evidence? We have all talked about it here for several days. Everybody has talked about evidence. Facts, testimony, exhibits, they are all interchangeable, really. There are two types of evidence, Ladies and Gentlemen. One is direct evidence. That is what you see. You look across at the window, you are looking at it but if you were downstairs, and you didn't see a window, but you saw a light coming through, you could presume, couldn't you not, there would be a window on a certain given site, so there is circumstantial evidence, too. Circumstances that surround proof, and sometimes it is considered in the legal end of it, that circumstantial evidence is better than direct evidence, because the little small pieces of evidence, when you, if they exist, when you put them together in a [fol. 582] mosaic, make a much better and clearer picture than does direct evidence. So you have circumstances in this case of evidence surrounding this transaction, pass upon it. There is a rule of circumstantial evidence and that is this, that if the evidence is capable of two constructions, one is a construction of innocence or guilt, and ambivalent position, then you must resolve that in favor of the defendant. But if the circumstances point in but one direction and that is the guilt of the defendant, then under those circumstances, Ladies and Gentlemen, you must accept it. You must view it from this viewpoint and you must, so if upon arranging the facts in a case two constructions appear, the one that is most favorable to the defendant you have to take, under our system

of jurisprudence. But if it points in one direction only and that is the guilt of the defendant, if it is inconsistent with every reasonable hypothesis of innocence of the defendant, you are bound as jurors to accept this. This is what you are to take. So do not regard circumstantial [fol. 583] evidence circumspect, weigh it and test it in the light of all of the facts and circumstances in this case. So I must point out to you that circumstantial evidence must not be disregarded unless it fails to meet the test that I have given to you; and if it does, then you disregard it completely.

Let me say this to you, if you will, please. We have talked about evidence, rules of law. Now we will talk about witnesses. How does one weigh testimony? How does one view witnesses? You do not, Ladies and Gentlemen, substitute your judgment for theirs. You most assuredly do not substitute a version that you may set up in your own mind of events as you think they ought to be. You weigh the testimony.

Number of witnesses has nothing to do with it, Ladies and Gentlemen. Quality of the testimony is what you are looking for. How does a person appear when they are testifying before you? Are you impressed with their candor? Are you impressed with their ability to speak the truth? Was there hesitancy? Is there a lack of [fol. 584] candor? Are they evasive? These would be things that you would immediately pass upon in talking to people every day in the week, wouldn't you? The witnesses that sit before you, and I must say this to you that as we all sit here, People and the Defendant, we are all on an even par, there is no advantage, Ladies and Gentlemen, to this defendant or this People, to the District Attorney or to the Attorney for the Defendant. Fundamental fairness requires that everyone start off at an equal in a Courtroom. Now, you have a right, of course, to consider motive. You have a right to consider interest, you have a right to consider what interest does a person have in the outcome of the litigation. I say to you that in any criminal case, a defendant is an interested witness, as a matter of law. This doesn't brand him as a perjuror, Ladies and Gentlemen; this doesn't

brand him as a liar. It is merely an element that you may take into consideration in your deliberations in the jury room in weighing evidence that you have before you. Have I made this clear now in the long period of time [fol. 585] that we have been talking, that what you do is weigh the evidence. You don't weigh it with sympathy. You might love to do it; you don't love to do it with fear, you don't weigh it with prejudice. You weigh it as reasonable men and women in the performances of an important duty to the People of the State of New York and to this defendant who is on trial here. That is the way you weigh it. But, Ladies and Gentlemen, you don't leave your common sense, either, and go into limbo when you go into a jury room. You take in with you your every-day knowledge, you take in with you your dealings with other persons as standards that you utilize in testing this evidence.

If you were to find that a witness lied or that a witness had misrepresented a material fact, of course, Ladies and Gentlemen, under those circumstances you may disregard that portion that you consider to have been misrepresented. You most assuredly disregard all of the testimony of a witness if you find that they had lied. This is what you will do in every-day life. There is no great mystery about what I have just told to you. I [fol. 586] again must repeat, that you must not have any concern with an element of punishment. This is a function for the Court. If the defendant committed any of the acts that were complained of in this information, Ladies and Gentlemen, the consequences are his, not yours or mine.

Each juror, Ladies and Gentlemen, is entitled to his own opinion and I think I indicated to you before that you must not yield to the opinion of other jurors unless you are convinced that the reasoning that is utilized in your discussion persuades you that the People met the burden of proof. You will have to decide, each one of you for yourselves, and as I indicated to you, you must not permit any previous impression gathered in this case or from some other suit, of course, to in any way influence you in a fair or reasonable determination.

No other body, Ladies and Gentlemen, in our system has the task that you have. You have a responsibility under your oaths to fulfill. Most assuredly you do know this, if this defendant is innocent of crime for which he [fol. 587] is on trial here, he should not be convicted. He should be acquited. But most assuredly if he is guilty of the crime, he should be convicted. It is your function to determine the guilt or innocence of this defendant within the area that I have just mentioned to you, and this function should be discharged with courage, intelligence, loyalty and with the fullest responsibility to your obligations as jurors.

Mr. Foreman, it has been stated to you before that your function in this case will be to try and arrive at a unanimous verdict. This constitutes, under criminal law, all 12. Are there any exceptions, Gentlemen?

MR. PROJANSKY: I have one request to charge.

THE COURT: We will take any exceptions to what I have, sir.

MR. FACELLE: No exceptions.

MR. PROJANSKY: No exceptions.

THE COURT: Your request, Mr. Projansky, is what?

MR. PROJANSKY: Your Honor, I would like to request under Section 445 of the Code of Criminal Pro-
[fol. 588] cedure, charge the jury as to necessarily included lessor crimes, that if the jury find that the People have not proven all of the elements of the crime beyond a reasonable doubt, they may nevertheless convict the defendant of lesser crimes necessarily included within the crimes charged in the indictment, and that if the jury find that the defendant did not make a sale on the dates in question, but that he did then and there unlawfully possess heroin, they may convict him of that misdemeanor.

THE COURT: No, you may have an exception. You may have an exception. He is not charged with possession nor is there, under the facts and circumstances in this case, an issue which permits of the submission of the lesser charge in here. I will grant you an exception to it. Now, may I ask, in the presence of the defendant—

MR. FACELLE: Would Your Honor please?

THE COURT: I am sorry.

MR. FACELLE: I have a request. If Your Honor please, I will ask the Court charge the jury that they must render a verdict and make a finding on each of the [fol. 589] two counts independently and separately.

THE COURT: Yes, I will.

MR. FACELLE: Thank you.

THE COURT: I am sure that you recognize, as I specified, that there are two charges and you must pass upon both of these charges. This is what the request was.

MR. PROJANSKY: Your Honor, will you please charge the jury that there is no necessity that their findings, their verdicts as to the two counts be the same.

THE COURT: Yes, surely they may find. You may find the man not guilty of the count charging the sale on January 4th, and guilty of the count of January 6th. You may have any one of four combinations within the evidence. You recognize that, do you not? That there could be any one. You could acquit on both counts, you could find him guilty on both counts, then you may cross one to the other, this depends upon the results of your determination; and forgive me for not having explored it with you, but it seemed that as an intelligent jury I was [fol. 590] so sure that you recognized it. I didn't feel that I had to press it. May I ask from the defendant, at this time, is he prepared to permit, if the jury so calls for them, the submission to the jury of the exhibits?

MR. PROJANSKY: I have no objection, Your Honor, to the submission.

THE COURT: Mr. Foreman, in the event that you, in the course of the deliberations, want the exhibits, feel perfectly free to call for them and we will send them to you. Secondly, if you would find it desirable and necessary to have some portion of the testimony read or portion of the Law read, you do know that you could communicate this fact to the deputy sheriff who will be with you and we will be here for the purpose of supplying you with this information. Yes, Mr. Facelle?

MR. FACELLE: May I be presumptuous, Your Honor; may I ask that the Court advise that the jury—that the exhibits that they may call for are the exhibits in evidence. There have been references to exhibits for identification and reference to exhibits in evidence.

THE COURT: Yes, they may call for them, but [fol. 591] they won't get them unless they are in evidence. * * *

* * * *

(Recess at 5:32 p.m..)

(Request from jury marked Court's exhibit 8.)

(Jury returns to the Courtroom at 9:05 p.m. The defendant and both counsel are present.)

THE COURT: Mr. Foreman, I have the note which you have just sent to me to the effect that the jury as [fol. 596] arrived at a verdict on one count in the indictment, and that at the present time there is a disagreement in the jury on the second count. May I ask you now, and I shall ask you as to the first count in the indictment, and I think if you will recall I indicated to you that it was possible for you to arrive at a combination of verdicts in reference to the various counts in the indictment. May I ask you, without at this moment indicating as to the first count of the indictment, which charges the defendant Viven Harris with the sale of a narcotic on January 4, 1966, have you been able to arrive at a verdict on that count?

JURY FOREMAN: No, Your Honor.

THE COURT: May I ask you, have you been able, as to the second count of the indictment, which charges that the defendant on the 6th day of January, 1966, unlawfully bartered and sold a quantity of heroin, have you arrived at a verdict on that count?

JURY FOREMAN: Yes, Your Honor.

THE COURT: May I ask you, sir, is this a unani- [fol. 597] mous verdict?

JURY FOREMAN: It is, Your Honor.

THE COURT: May I ask you, sir, how do you find the defendant on the second count in the indictment?

JURY FOREMAN: Should I stand?

THE COURT: Yes, you may.

JURY FOREMAN: The jury finds the defendant guilty.

THE COURT: As charged in the indictment?

JURY FOREMAN: As charged.

THE COURT: Now at this time, on behalf of the defendant,—you may be seated, Mr. Foreman. On behalf of the defendant, I am going to poll the jury and this simply means to ask each and every member of the jury, as your name is read, would you please indicate whether or not you agree with the statement which has been made by your foreman as to the second count in the indictment.

(Whereupon the jurors were individually polled and their verdict was the same as that announced by the foreman.)

THE COURT: Mr. Foreman, may I ask you please, [fol. 598] would you indicate, do you feel after the long hours which you have spent that it would be impossible for you to arrive at a verdict or consensus of opinion in your jury on the first count?

JURY FOREMAN: I do not feel we could arrive at one.

THE COURT: And you do not feel that under the circumstances any longer deliberation may blend to a result in connection with the verdict?

JURY FOREMAN: I do not feel.

THE COURT: Of course you folks do know that no other jury would know any more about this case than you would, that all of the evidence that is available in the case is here before you, and undoubtedly it would be impossible to get a better jury than you Ladies and Gentlemen represent. But under the circumstances, I will find that there is a disagreement in the jury, with the consent of the defendant, on the first count.

MR. PROJANSKY: Yes, Your Honor, we'll consent to that.

THE COURT: And is that agreeable to the People? [fol. 599] MR. FACELLE: Yes, Your Honor.

THE COURT: Then I will accordingly discharge the jury after having rendered a verdict of guilty on the second count. * * *

* * * *

VOLUME III

COUNTY COURT : WESTCHESTER COUNTY

Indictment #50-66

THE PEOPLE OF THE STATE OF NEW YORK

—against—

VIVEN HARRIS, DEFENDANT

SENTENCE MINUTES

December 20, 1966
White Plains, New York

Before:

HON. ROBERT E. DEMPSEY, County Judge.

Appearances:

LEONARD RUBENFELD, District Attorney, Attorney for the People, County Courthouse, White Plains, New York

By: JAMES R. COWHEY, Esq., Of Counsel, Assistant District Attorney.

EARL J. McHUGH, Esq., Attorney for the Defendant, 120 Grand Street, White Plains, New York

* * * *

[fol. 9] * * * I feel that in the past record, in his conduct, that he has time to serve. It is the Judgment of the Court that he will be sentenced to the Sing Sing State's Prison for a term the minimum of which will be not less than 6 years and the maximum of which will not be more than 8 years.

MR. McHUGH: Eight years, Your Honor?

THE COURT: Yes.

* * * *

SECOND JUDICIAL DEPARTMENT

APPELLATE DIVISION

By BELDOCK, P.J.; CHRIST, BRENNAN, SAMUEL RABIN and MUNDER, JJ.

PEOPLE, &C., res, v. VIVEN HARRIS, ap—Judgment of the County Court, Westchester County, rendered Dec. 20, 1966, affirmed, Beldock, P.J., Brennan and Munder, JJ., concur, with the following separate memoranda:

Brennan, J.: The indictment, containing two counts, alleged that defendant committed the crime of selling a narcotic drug, by selling heroin on Jan. 4 and 6, 1966. The sales were to an undercover agent. On Jan. 7, 1966, defendant was arrested and within one hour he made a statement in the assistant district attorney's office. He was apprised of his privilege to remain silent and that anything he said might be used against him. He was then questioned, but prior to making any admissions said he would like to speak to an attorney. The assistant district attorney brought the questioning to a close, told defendant he had a right to counsel and asked him if he desired to speak to an attorney then. Defendant replied that he would "call tomorrow." He asked what the charges against him were and, upon being informed, volunteered the information that everybody in his area was selling narcotics. After this statement the assistant district attorney posed a few questions which defendant answered. Defendant said his answers were voluntary and it was his decision to talk after requesting counsel. No notice of an intention to use the statement as evidence was given by the People (Code Crim. Pro., 813-f). At the trial the undercover agent testified as to the transactions of Jan. 4 and 6. His testimony was corroborated in minor respects by another undercover agent. Defendant (who admitted at the trial to three prior convictions) testified on direct examination that he did not give the undercover agent drugs on Jan. 4, 1966; but on Jan. 6, 1966, he did go to a friend's home where he put baking

powder in two glassine envelopes and sold the latter as heroin to the agent.

On cross-examination the assistant district attorney read into evidence portions of defendant's statement of Jan. 7, 1966, solely to impeach defendant's credibility. Defense counsel objected on the ground that no pre-trial notice had been received and that the statement had been taken in violation of Miranda v. Arizona (384 U. S. 436). The court determined, after hearing argument, that the statement had been elicited without the full Miranda warnings and, therefore, could only be used as an instrument of impeachment. The gist of the portions read in the presence of the jury is twofold: (1) on Jan. 4, 1966, defendant acted as the undercover police officer's agent in obtaining narcotics and (2) on Jan. 6, 1966, defendant obtained narcotics from an unknown person outside a bar and then sold the drugs to the undercover agent in a bar. The court charged the jury that this statement went to the credibility of the witness and was "not proof of the defendant's guilt." Defense counsel in his summation uttered a similar admonition. The jury disagreed as to the count relating to Jan. 4, 1966, but found defendant guilty of the second count.

Section 813-f of the Code of Criminal Procedure provides that the People must give notice to the defendant before trial where they "*intend to offer* a confession or admission *in evidence*" (emphasis supplied); and section 813-g provides that "[i]f the motion [to suppress the statement] is granted, the confession or admission shall not be admissible *in evidence*" (emphasis supplied). It has been held that the failure to give the prescribed notice deprives the People of the evidentiary use of the statement when it is offered in evidence (People v. Schwartz, 30 A. D. 2d 385, 388). The purpose of the statute is to enable the defendant to prove before trial that the statement was obtained involuntarily (People v. Schwartz, supra; People v. Huntley, 15 N. Y. 2d 72). At bar the statement was marked in evidence at the suggestion of the trial judge and upon consent of respective counsel, but only to enable defense counsel to peruse it, and it was not made available to the jury. Conse-

quently, it is readily apparent that the statement was not put in evidence in the truest sense of that word. Accordingly, since the aforementioned statutes are directed at *evidence* in its conventional form, we have concluded that no pre-trial notice is required as to statements used solely for impeachment.

On this appeal the district attorney has conceded that the statement was obtained in violation of Miranda and would have been suppressed had he attempted to use it as evidence-in-chief. We adopt his concession but point out that, under the circumstances herein, the Miranda warnings given herein might have been found sufficient by the trial judge after a Huntley (People v. Huntley, supra) hearing (see People v. Post, 23 N. Y. 2d 157; United States v. Fisher, 387 F. 2d 165, cert. den. 390 U. S. 953; United States v. Messina, 388 F. 2d 393, cert. den. 390 U. S. 1026).

Nevertheless, the district attorney argues that People v. Kulis (18 N. Y. 2d 318) sustains the use of such an illegal statement for the purpose of impeachment. In that case the Court of Appeals held that a statement obtained in violation of Escobedo v. Illinois (378 U. S. 478) can be used to impeach a defendant's testimony given on direct examination. The rule of the Kulis case, and of Walder v. United States (347 U. S. 62) which it purported to follow, is that a tainted statement (or the fruits thereof) is admissible solely to impeach a defendant's direct testimony on collateral matters not directly related to the crime for which he was indicted (see People v. Schwartz, 30 A. D. 2d 385, supra; People v. Johnson, 30 A. D. 2d 575; People v. Quick, 30 A. D. 2d 561; People v. Dixon, 27 A. D. 2d 740; United States v. Curry, 358 F. 2d 904, cert. den. 385 U. S. 873; Bailey v. United States, 328 F. 2d 542; Tate v. United States, 283 F. 2d 377).

At Bar it is apparent that the statement pertaining to the events of Jan. 6, 1966, when read before the jury, violated the holdings in Kulis-Walder. However, it is now well settled that the "harmless-constitutional-error rule" does not mandate reversal where the appellate court concludes that the error was harmless beyond a reason-

able doubt (Chapman v. Calif., 386 U. S. 18, 22). This means that the error is harmless if it could not in any event affect the outcome and did not play a "meaningful role" in the case (People v. Savino, 22 N. Y. 2d 732, 733; People v. Ross, 429 P. 2d 606). In an analogous factual context our Court of Appeals has recently said "it is difficult to conclude that the errors were of sufficient consequence to merit a new trial" (People v. Miles, 23 N. Y. 2d 527 [dec. Jan. 16, 1969]). The court therein further observed that "the impropriety is confined to an incidental part of the case and on a trial in which the proof was overwhelming in establishing the guilt of defendants. Indeed, the very use and introduction of the pre-trial statement was the result of the able prosecutor 'overtrying' his case." These observations are appropriately applicable to the case at Bar and we have concluded that, beyond a reasonable doubt, the jury could not, minus the error, have determined the case otherwise and, therefore, the error was harmless.

Defendant argues that the Miranda decision overrules Kulis or, as in the case at Bar, where Miranda violations occur, Kulis does not apply (see cases collated in 13 New York Law Forum 146, 158-162; Pitler, "The Fruit of the Poisonous Tree," 56 Calif. L. Rev. 579, 630-636). The United States Supreme Court has not yet passed upon the question (cf. Harrison v. United States, 392 U. S. 219, dissenting op. at p. 234) and in Kulis itself the dissenters observed that Miranda governed (see People v. Johnson, 30 A. D. 2d 575, supra, dissenting memo., pp. 575-576; cf. People v. Shivers, 21 N. Y. 2d 118, 122). Until the question has been passed upon by our Court of Appeals we decline to adopt defendant's argument and depart from the rationale of Kulis. Accordingly, we are of the opinion that a statement obtained in violation of a defendant's Miranda rights is admissible solely for impeachment purposes (see People v. Miles, 23 N. Y. 2d ——, supra, [dec. Jan. 16, 1969]).

Beldock, P.J., and *Munder, J.*—Because of our opinion in People v. Schwartz (30 A. D. 2d 385) we consider ourselves constrained to agree with the theory that an illegally obtained statement may be used to impeach a

defendant's direct testimony only on collateral matters not directly related to the crime charged against him. We agree that section 813-f of the Code of Criminal Procedure, regarding the notice that must be given by the People if it is intended to offer such a statement in evidence as a part of the People's case, has no application if the statement is to be used solely for impeachment purposes. If a crime has not been otherwise proved, however, such a statement may not form the basis for a conviction (People v. Marcano, N. Y. L. J., June 20, 1968, p. 2, col. 2 [App. Term, First Dept.]). But where it is used only to challenge credibility, and a proper charge by the court keeps it in true perspectives, we do not believe the familiar evidentiary rule should be so diluted. We think that any testimony given by a defendant as a witness in his own behalf, directly related or collateral to the crime charged, is subject to contradiction through his prior inconsistent statements, not to establish the truth of the prior statements but to impeach his credibility and thereby discredit his testimony (cf. Richardson on Evidence [9th ed.], sec. 513).

Christ, J., dissents and votes to reverse the judgment and grant a new trial, with the following memorandum in which Rabin, J. concurs: Defendant was charged in two counts with selling heroin to an undercover police officer on Jan. 4, and Jan. 6, 1966. The trial essentially involved a test of credibility between the undercover agent and defendant. The jury was unable to agree as to the alleged sale on Jan. 4, although the undercover agent testified unequivocally that defendant sold him a bag of white powder on that date and the police chemist testified that the bag contained heroin. Defendant denied this alleged sale. It seems reasonable to infer from the jury's disagreement on the Jan. 4 charge that they may have had some reservations about the officer's veracity.

As to the Jan. 6 charge, the undercover agent testified that defendant sold him two "decks" of heroin on that date. Defendant testified that the agent kept asking for drugs that night and that defendant went to a friend's apartment, filled two empty glassine envelopes with baking powder and gave them to the agent for $12.

The prosecution was then permitted to impeach defendant's credibility by the use of a statement concededly inadmissible under Miranda v. Arizona (384 U. S. 436) and which severely undermined his testimony as to matters directly related to the crime charged (People v. Schwartz, 30 A. D. 2d 385, 388; People v. Johnson, 30 A. D. 2d 575; cf. People v. Shivers, 21 N. Y. 2d 118, 122). There can be no mistake about the effect of this use of the statement. It tended "to prove guilt by implication" and was "incriminating in any meaningful sense of the word" (Miranda v. Arizona, supra, p. 477). Defendant was convicted on the second count and sentenced to six to eight years in prison.

Under the circumstances outlined above, I cannot agree that this error of constitutional dimension was "harmless beyond a reasonable doubt" (Chapman v. California, 386 U. S. 18, 24). An error is not harmless if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction" (Fahy v. Connecticut, 375 U. S. 85, 86-87). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (Chapman v. California, supra). Surely it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the Jan. 4 charge (cf. Anderson v. Nelson, 390 U. S. 523, 525). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's. The judgment should be reversed and a new trial granted.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 17, 1969

HON. GEORGE J. BELDOCK, *Presiding Justice*
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. SAMUEL RABIN
HON. FRED J. MUNDER
Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

VIVEN HARRIS, APPELLANT

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION

In the above entitled action, the above named Viven Harris, defendant in this action, having appealed to this court from a judgment of the County Court, Westchester County, rendered December 20, 1966; and the said appeal having been submitted by Joel Martin Aurnou, Esq., of counsel for the appellant, and by James J. Duggan, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's Opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby affirmed.

Beldock, P.J., Brennan and Munder, JJ., concur, with separate memoranda.

Christ, J., and Rabin, J., dissent and vote to reverse the judgment and grant a new trial, with dissenting memorandum by Christ, J., in which Rabin, J., concurs.

Enter:

HERMAN M. POGUL
Clerk of the
Appellate Division

STATE OF NEW YORK
COURT OF APPEALS

2. No. 254. 69

THE PEOPLE &C., RESPONDENT

vs.

VIVEN HARRIS, APPELLANT

OPINION

PER CURIAM:

On this appeal from a judgment convicting the defendant of selling narcotics, the defendant raises two points.

The first concerns a statement obtained from him after his arrest and under circumstances which concededly violated the requirements prescribed by the Supreme Court in *Miranda* v. *Arizona* (384 U. S. 436). In its direct case, the People did not offer the statement in evidence. On cross-examination, however, and over the defendant's objection, the statement was employed extensively by the prosecutor in cross-examining the defendant who had taken the witness stand in his own defense. The statement was at complete variance with the account given by the defendant on direct examination although it was no more inculpatory than his direct testimony. Such use of the statement for purposes of impeachment is authorized by our decision in *People* v. *Kulis* (18 N Y 2d 318), to which we adhere.

The defendant's second contention is that use of the statement should, in any event, be barred because the People failed to comply with section 813-f of the Code of Criminal Procedure which provides that, "where the people intend to offer a confession or admission in evidence * * * the people must * * * give written notice of such intention to the defendant". We agree with the decision of the Appellate Division herein—and not with its later, seemingly inconsistent, position in *People* v.

Torres (32 A D 2d ——, N.Y.L.J., June 12, 1969, p. 15, col. 8)—that section 813-f is not applicable. Section 813-f is not intended as a discovery device; its function—as the very language of the statute itself indicates (see tit. II-C of Part VI, Code Crim. Pro.)—is to afford a defendant an opportunity for a hearing under section 813-g to determine the voluntariness of his confession or admission. Accordingly, when the prosecution neither offers nor plans to offer a statement in evidence against the defendant, the section in question is just not applicable. Moreover, where, as in the present case, a statement obtained in violation of *Miranda* is used solely for impeachment purposes, no purpose would be served by requiring compliance with section 813-f, and the People were not obligated to furnish the notice there prescribed.

The judgment should be affirmed.

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

VIVEN HARRIS, DEFENDANT-APPELLANT

FULD, Ch. J. (concurring):

Some three years ago, the court held in *People* v. *Kulis* (18 N Y 2d 318) that, although a statement concededly taken from a defendant in violation of his constitutional rights cannot be received in evidence against him, it may, nevertheless, be used for purposes of cross-examining him if he takes the witness stand and testifies in his own defense. This seemed wrong to Judge Keating and to me, and we dissented (18 N Y 2d, at pp. 323-324) on the ground that to allow the use of an illegally obtained confession or statement even for impeachment purposes was violative of a court's responsibility to preserve and maintain basic constitutional rights. Not alone a need to deter official misconduct but a regard for "the imperative of judicial integrity" (*Elkins* v. *United States*, 364 U.S. 206, 222) mandates that a confession which was unlawfully taken from a defendant should not be used for any purpose.

I still believe that this is so, and I am confirmed in that view by the fact that, since the *Kulis* decision was handed down, at least a dozen tribunals, including the highest courts of three states and six Federal Courts of Appeals, have actually repudiated the conclusion reached in *Kulis* and held an illegally procured statement completely unusable.[1] However, in light of the majority's present determination to adhere to the decision in *People*

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[1] See *State* v. *Brewton* (247 Or. 241, cert. den., 387 U.S. 943 [1967]); *Commonwealth* v. *Padgett* (428 Pa. 229 [1968]); *Gaertner* v. *State* (35 Wis 2d 159 [1968]); *Proctor* v. *United States* (404 F 2d 819 [D.C. Cir. 1968]); *United States* v. *Fox* (403 F 2d 97 [2d Cir., 1968]); *United States* v. *Pinto* (394 F 2d 470 [3d Cir., 1968]); *Breedlove* v. *Beto* (404 F 2d 1019 [5th Cir., 1968]); *Groshart* v. *United States*, 392 F 2d 172 [9th Cir., 1967]); *Wheeler*

v. *Kulis* (18 N Y 2d 318, *supra*), I deem myself constrained to cast my vote for an affirmance.

• • • •

Judgment affirmed. Opinion Per Curiam. Concur: Burke, Scileppi, Bergan, Breitel and Jasen, JJ.; and Fuld, Ch. J., in a separate opinion.

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v. *United States*, 382 F 2d 998 [10th Cir., 1967]); *United States* v. *Prebish* (290 F. Supp. 268, 273-275 [D.C. Fla. 1968]); *United States* v. *Birrell* (276 F. Supp. 798, 817 [D.C. S.D. N.Y., 1967]); cf. *United States* v. *Armetta* (378 F 2d 658, 661-662 [2d Cir., 1967]).

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of July in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD
Chief Judge, Presiding
RAYMOND J. CANNON
Clerk

REMITTITUR JULY 2, 1969

2. No. 254. 69

THE PEOPLE &C., RESPONDENT

vs.

VIVEN HARRIS, APPELLANT

BE IT REMEMBERED, That on the 13th day of May in the year of our Lord one thousand nine hundred and sixty-nine, Viven Harris, the appellant—in this cause, came here unto the Court of Appeals, by Joel Martin Aurnou, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Carl A. Vergari, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Joel Martin Aurnou, of counsel for the appellant—, and by Mr. James J. Duggan, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Westchester County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Westchester County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office
Albany, July 2, 1969

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
Clerk

[SEAL]

SIR.

PLEASE TAKE NOTICE that the within is a true copy of an order duly entered in the Office of the Clerk of Westchester County on the 8th day of August, 1969.

Dated: August 11, 1969.

Yours, etc.

CARL A. VERGARI
District Attorney of
Westchester County
Office and Post Office Address:
Court House
White Plains, N. Y.

TO Joel Martin Aurnou, Esq.
Attorney for Appellant

SIR:

PLEASE TAKE NOTICE that the within order will be presented for settlement and signature to the Hon. ....., one of the judges of the within named Court at the Courthouse, White Plains, N. Y. at 10 A.M. on the ..... day of ....., 19....

Dated: ....., 19....

Yours, etc.

District Attorney of
Westchester County
Office and Post Office Address
Court House
White Plains, N. Y.

TO ....., Esq.
Attorney for Defendant

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

VIVEN HARRIS, APPELLANT

REMITTITUR

CARL A. VERGARI
District Attorney of Westchester County

Office and Post Office Address:
Court House - - - White Plains, N. Y.

TO Joel Martin Aurnou, Esq.
Attorney for Defendant

COUNTY COURT : COUNTY OF WESTCHESTER

Indictment No. 50/1966

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

—against—

VIVEN HARRIS, DEFENDANT

ORDER

A motion having been made by JOEL MARTIN AURNOU, ESQ., for an Order dismissing the first count of the indictment herein pursuant to Section 66A of the Code of Criminal Procedure, Section 8 of the Code of Criminal Procedure, Section 12 of the Civil Rights Law, and the Sixth Amendment to the Constitution of the United States, and upon reading and filing the Notice of Motion and Affirmation of JOEL MARTIN AURNOU, ESQ., both dated the 14th day of May, 1969, and the Affidavit in Opposition of JAMES J. DUGGAN, sworn to June 10, 1969, and the Reply Affirmation of JOEL MARTIN AURNOU, affirmed the 11th day of June, 1969, together with due proof of service thereof, and after hearing counsel in open Court and after due deliberation, this Court having rendered its decision in writing,

NOW, upon motion of JOEL MARTIN AURNOU, it is

ORDERED, that the motion be and the same hereby is granted and the first count of indictment No. 50/1966 be and the same hereby is dismissed with prejudice.

ORDER signed this 31 day of July, 1969, at White Plains, New York.

ENTER,

/s/ George Beldock
J.C.C.

SUPREME COURT OF THE UNITED STATES

No. 1022 Misc., October Term, 1969

VIVEN HARRIS, PETITIONER

v.

NEW YORK

On petition for writ of Certiorari to the Court of Appeals of the State of New York.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1635 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 1, 1970

Mr. Justice Marshall took no part in the consideration or decision of this motion and petition.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1970 397869 12